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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 In re:

4 PLATINUM-BEECHWOOD LITIGATION 18 Civ. 06658 (JSR)

5 -----x

6 MARTIN TROTT and CHRISTOPHER 18 Civ. 10936 (JSR)  
7 SMITH, as Joint Official  
8 Liquidators and Foreign  
9 Representatives of PLATINUM  
10 PARTNERS VALUE ARBITRAGE FUND LP  
(in Official Liquidation) and  
11 PLATINUM PARTNERS VALUE ARBITRAGE  
12 FUND LP (in Official Liquidation)

13 Plaintiffs,

14 v.

15 PLATINUM MANAGEMENT (NY) LLC,  
16 et al.,

17 Defendants.

18 -----x Trial

19 New York, N.Y.

20 December 15, 2022  
21 9:00 a.m.

22 Before:

23 HON. JED S. RAKOFF,

24 District Judge  
25 and a Jury

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## APPEARANCES

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Also Present:

Michael Robson, Paradocs Motion Support

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1 (In open court; jury not present)

2 THE COURT: Where do we stand on the exhibits and the  
3 index to the exhibits?

4 MS. SHEN: Your Honor, the parties, we have one set of  
5 printed copies. Plaintiffs printed the JX exhibits and the  
6 PX exhibits, and the defendant printed the DX Exhibits. We do  
7 have a proposed joint index that we just need to finalize and  
8 print.

9 I do think there was at least one question about an  
10 exhibit that was not objected to, but was not marked received  
11 on the record, it is PX 364. We wanted to just clarify that  
12 that was, in fact, received.

13 THE COURT: Okay.

14 MR. AMENT-STONE: Mostly the same as what she said, we  
15 expect delivery of our exhibits this morning, within the hour.

16 THE COURT: And there's this one exhibit that was just  
17 mentioned, do you have any objection to its receipt?

18 MR. AMENT-STONE: I'm going to open up my email. I  
19 believe the one she's talking about we thought was not  
20 received.

21 MS. SHEN: But there was no objection on the record.  
22 It was not marked by the Court as having been received.

23 THE COURT: I'm sorry. Was it offered?

24 MS. SHEN: Yes, it was offered. Mr. Lauer said he had  
25 no objection, and then there was just no Court --

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1 THE COURT: It's received.

2 (Plaintiff's Exhibit 364 received in evidence)

3 THE DEPUTY CLERK: All jurors are present.

4 THE COURT: We're going to start summations right now,  
5 but I assure you that you will not be given any lunch unless  
6 you get this exhibit list and the exhibits themselves ready to  
7 go in during the lunch hour. I warned you about this  
8 yesterday. I want that because as soon as I charge the jury,  
9 we're sending in the exhibits.

10 Bring in the jury.

11 MR. GLUCK: There is one issue. I think we have to  
12 get that screen working.

13 THE COURT: We're bringing in the jury.

14 (Continued on next page)

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Summation - Mr. Gluck

1 (Jury present)

2 THE COURT: Please be seated.

3 Good morning, ladies and gentlemen. Thank you for  
4 coming in early. We're about to hear closing arguments from  
5 counsel.

6 I want to remind you, as I did before opening  
7 statement, that nothing counsel says is itself evidence. The  
8 evidence came from the witnesses, the exhibits. I don't think  
9 there were any stipulations, but if there were, that would be  
10 the third possible source of evidence.

11 So, why do we have closing arguments? Well, before  
12 you start your deliberations, it may be useful for you to hear  
13 what counsel for both sides thinks that the evidence proves or  
14 fails to prove as the case may be. This is just their view,  
15 but they may suggest some insights that you may not have  
16 thought of. So it's always helpful to hear their view of the  
17 evidence.

18 The plaintiff has what we call the burden of proof.  
19 So we'll start with the plaintiff.

20 MR. GLUCK: Good morning, and thank you for your time  
21 over the last two weeks. It has been appreciated and we hope  
22 that your deliberation will go smoothly.

23 Here is what we believe plaintiffs have shown over the  
24 last 12 days. First, Mr. David Bodner, a Platinum party  
25 partner was a fiduciary of the hedge fund PPVA. Second, PPVA

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1 was overvalued. Third, Mr. Bodner knew that PPVA was  
2 overvalued, and he knew before the 2012 incentive fees were  
3 paid and at multiple points after, and we're going to go  
4 through that and what it means.

5 Mr. Bodner, Mr. Nordlicht, and Mr. Huberfeld, all of  
6 whom you heard from, conspired together to conceal and  
7 camouflage the overvaluation such that by 2016 in April, you  
8 have a wildly catastrophic overvaluation. That's what  
9 happened. If you find that they worked together, that they  
10 conspired to conceal this overvaluation, real easy damages  
11 calculation, goes all the way to the beginning. And I'm going  
12 to get into that when we describe the Court's instructions,  
13 what he will be instructing you, but we'll go over it in some  
14 of these slides, as well.

15 Mr. Bodner did not disclose the overvaluation at any  
16 time through today. He denies it happened. That's their  
17 position. That's why they called the auditors, that's why they  
18 put him on the stand. He has never disclosed it and it's  
19 undisputed, because if he disclosed it, he would admit it, so  
20 it's an impossibility.

21 Secondly, he wielded some influence, and he could  
22 have stopped it himself or, as you heard Mr. Quintero, our  
23 expert, say, he could have alerted other investors and there  
24 might have been a run in the bank. Now, he didn't say when  
25 that would have occurred, but he could have. And we've seen

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1 evidence about mini runs on the bank that actually  
2 happened.

3 Ultimately, of course, Mr. Trott was appointed  
4 pursuant to that very circumstance. There was a redemption  
5 demand, finally, finally, finally, not met, court gets  
6 involved, put into bankruptcy, appoint a liquidator. That's  
7 why we're here. What we're saying is that if this had been  
8 disclosed earlier, it would have happened already, that's it.

9 Lastly, you heard a lot about this release, and the  
10 Court, I believe, has made the question very simple for this  
11 jury ruling on different things. What he says is that if  
12 Platinum Management or Nordlicht participated in the  
13 overvaluation, this release is no good as to Bodner for the  
14 overvaluations, very simple. If Platinum Management did the  
15 overvaluation, they couldn't release Bodner for it. End of  
16 story.

17 You heard a lot about whether there was adequate  
18 value and consideration, who got what. I'll get into it a  
19 little, but this Court's clear instructions as of today, if  
20 Platinum Management did an overvaluation, Nordlicht did it,  
21 they could not release Bodner. It's invalid as a matter of  
22 law. End of story.

23 I spent a lot of time on this first one because that's  
24 what a lot of this is about. Mr. Bodner is saying that he was  
25 a passive investor in Platinum Management. He owned his

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1 interest in Platinum Management through this Mark Nordlicht  
2 Grantor Trust and, in turn, it was a family company and he  
3 ultimately controlled that.

4 We don't think he was a passive investor. We think  
5 the evidence clearly demonstrates he wasn't a passive investor.  
6 Rather, he was an active member and he knowingly put himself  
7 out there as one who was trusted and relied upon to oversee  
8 these investments.

9 This is the first question you're going to be asked to  
10 address, was Mr. Bodner a fiduciary. If the answer is no,  
11 that's effectively the end, because what we're saying is he was  
12 and he breached his duty because, as a fiduciary, when he  
13 learned about that overvaluation, he had an obligation to  
14 disclose it, period. Mr. Bodner was a fiduciary of PPVA and  
15 Platinum Management just like Mr. Nordlicht was, just like  
16 Mr. SanFilippo was, just like the other portfolio managers  
17 were. Their duty happens to be written in a contract, but  
18 there is absolutely no requirement that there needs to be a  
19 contract for someone to be a fiduciary. If there was, we  
20 wouldn't be here.

21 You can become a fiduciary by your conduct. In this  
22 case, it's conduct over about 12 years, 2004 to 2016. So it  
23 doesn't matter that there's this trust agreement. It happens  
24 to say he's a passive member - that is not how things worked in  
25 practice. That is why we are in trial, because he wasn't a



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1 passive member. He did not sit back and collect checks. He  
2 was there every day, overseeing the investments, soliciting new  
3 investors, dealing with the investors and dealing with  
4 operations.

5 We started this case with you're going to hear about a  
6 hedge fund manager, this is what a hedge fund manager does. In  
7 fact, I'm going to get into some of the expert testimony. We  
8 put up an expert, a guy who spent 20 years supervising hedge  
9 funds and hedge fund managers, and he says I've looked at  
10 this, I've looked at the whole record, more than what the  
11 jury has seen because we obviously can only introduce so many  
12 exhibits in 12 days, but he says this is not consistent with a  
13 passive ownership interest in a hedge fund management  
14 company. Solicited investors, participated in the investment  
15 process, values, liquidity, everything, actual operations,  
16 employees, where we going to move, where am I going to have an  
17 office, I need a Bloomberg terminal. The evidence clearly  
18 shows it.

19 So what is a fiduciary and what is this question that  
20 you will need to ask yourself? Someone who's trusted. And  
21 let's just be clear, anyone who manages investments of an  
22 investment fund owes fiduciary duty to fund its investors.

23 You can have this by conduct. If Mr. Bodner was  
24 trusted, represented himself as a principal of the fund, told  
25 investors he would look after the investments, he's a

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1 fiduciary. You don't get to just write down on paper that  
2 you're a passive member and then act contrary to that and then  
3 not have any responsibility. Again, that's why we're here.

4 We have spent a couple of weeks showing all the ways  
5 Mr. Bodner exercised influence, control, authority. We've  
6 given some instances or even did an override or did a demand,  
7 but that isn't even the test. They're going to try to say oh,  
8 Mr. Nordlicht was ultimately in charge. That can be true and  
9 he can still be a fiduciary. It doesn't matter. The test is  
10 significant control, not total, he doesn't have to be a mini  
11 dictator back there where his will is the word. It's not what  
12 the issue is. In fact, he could have been a junior partner  
13 with Nordlicht as the senior partner and still been a  
14 fiduciary. It happens to be that everyone who encountered them  
15 believes he was the senior partner. That's not necessary to  
16 the finding. The only thing you need to decide is whether he  
17 engaged in significant of the trust, whether he represented  
18 himself as a principal. And if he did, that's a manifestation  
19 of the sense. That's him saying, come join my fund.

20 In fact, it's ironic that back when there were more  
21 issues in release with respect to this release, their entire  
22 argument is oh, look, Marcos Katz is going to be coming to the  
23 management company, people will like that and invest. That's  
24 what David Bodner was. He was a well known figure in the  
25 Jewish community and people invested because of him, and he

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1 solicited on that basis, document after document, email after  
2 email.

3 Now, let's be clear, there are some instances that we  
4 happen to have a very clear record of, of him issuing a dictate  
5 that somebody else disagreed with, him issuing a demand like,  
6 for example, this dinner. There is a little conflicting  
7 testimony about it, but the only conflict is between Mr. Bodner  
8 and Mr. Fuchs. Mr. Huberfeld says he doesn't remember  
9 anything, he was in and out, and that's the sum total of the  
10 people who were there.

11 We will talk about credibility, incentives in a  
12 moment, but the question is who do you believe on that?  
13 Mr. Nordlicht was on the stand. He was the one arguing with  
14 Mr. Bodner, and the Court is going to instruct you as to the  
15 parameters by which you can judge Mr. Nordlicht's testimony.  
16 We all know he took the Fifth Amendment after everything past  
17 his name. That's not our problem.

18 Mr. Fuchs testified very clearly about this point and  
19 very consistent. He issued a dictate, Nordlicht disagreed,  
20 nevertheless, not never a penny of partner funds were taken out  
21 after that dinner. That's serious stuff. It was a big part of  
22 their income. Law firms work the same way. Work hard during  
23 the year, you take a distribution at the end of the year,  
24 that's your whole salary. Fuchs was upset about it. That was  
25 a dictate.

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1 But, again, that's not the test. Did he exercise  
2 significant control, did he represent himself as a principal?  
3 Answer yes? Then we talk about whether there was an  
4 overvaluation, whether he knew about it, and what the damages  
5 are. This is an important point.

6 We saw an email, just by way of example, because  
7 remember, I'm going to get to this paper trail in a second  
8 where, after this Black Elk explosion, and this really was a  
9 big deal, it was their biggest investment and this thing was a  
10 disaster. The president of the company, Landesman, had to  
11 check with Mr. Bodner before he told the then next biggest  
12 investor, Fuchs, after Katz, about the whole Black Elk  
13 situation. That is control. That is authority and it happens  
14 to be in writing.

15 We saw another disaster situation. This is as the  
16 walls are closing. That Northstar entity, PPVA was about to  
17 miss one of the interest payments. The real insurance  
18 companies who had given the money that goes to pay the  
19 hospitals and the nursing homes for their patients to Beechwood  
20 were about to not realize that the debt paper they were holding  
21 was bad, right. And it was bad, Northstar debt was a zero,  
22 just a zero. PPVA even, let alone Northstar, couldn't make the  
23 interest payment. So this guy, this insurance guy at  
24 Beechwood, Scott Feuer says to get Murray and David on the  
25 phone, it's an emergency. That's another stakeholder,

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1 creditor, they believed he had the authority, he acted like it,  
2 and that's the point, it was different than the trust  
3 agreement. Your job is to decide what the truth is and what  
4 the reality was.

5 These are two examples, I think we've provided a lot  
6 through the trial, I have two hours today.

7 Over the last two weeks, you've probably gotten to  
8 know us a little bit, we don't know you at all, but you've  
9 watched us, I'm sure you have views about everyone here and  
10 where they stand and what they do. We have a lot of testimony  
11 that, basically everyone who encountered Mr. Bodner and  
12 Mr. Huberfeld and Mr. Nordlicht in the room arrived at the  
13 conclusion that Huberfeld and Bodner were senior partners, and  
14 this was not a passing issue.

15 In the worst of it, their family fortune, the Katz's,  
16 the grandfather sent the son into the offices for a couple of  
17 weeks. You sort of heard his testimony, you heard me read it.  
18 He's not within 100 miles of the courthouse, but I did my best  
19 to be this grandson, Michael Katz. He interacted with them for  
20 weeks, in the office, outside the office, in Nordlicht's  
21 apartment. He watched them, he watched them talk about value,  
22 he watched them argue, he watched them debate policy and what  
23 should be done and how his family is going to be compensated  
24 and what they should come in. These were live impressions over  
25 a real period of time. And it is not dismissible no more than

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1 is dismissible the impressions you formed about everyone in  
2 this room and the Court over the last two weeks either. It's  
3 real. You can tell. Again, that's why we have a jury and  
4 that's why we're here.

5 We saw Mr. Fuchs' testimony. Mr. Fuchs is in the fund  
6 because Bodner and Huberfeld represented themselves as  
7 principals of the fund and then he invested. That's his  
8 testimony. And it's his further testimony that he happened to  
9 have a lot of connections and knew people, and that every  
10 single person that he brought into the fund, he brought to meet  
11 Bodner and Huberfeld. And, once again, he was in the meeting,  
12 they represented themselves as principals of the fund, we'll  
13 watch your money and it will be safe. That is the testimony in  
14 the case.

15 And the only contrary evidence, and I mean only is  
16 this one trust agreement which says he's a passive member and  
17 Mr. Bodner's own testimony. Huberfeld didn't deny it.  
18 Huberfeld said, basically, I don't know to almost every  
19 question. Nordlicht did not deny it certainly, he took the  
20 Fifth Amendment to almost every question. And that's the inner  
21 circle, that's the sum total. Arguably, Mr. Huberfeld's  
22 nephew, David Levy, you might have seen him in the emails, he  
23 was closer to the inner circle. Would have been the same  
24 result as Mr. Nordlicht, a little bit of a waste of time.

25 There is no contrary testimony to this. There is a

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1 document and then they showed Mr. Fuchs' subscription agreement  
2 and said, didn't you sign this which says that Mr. Nordlicht is  
3 in charge? Yes, and they had him read it to you. That's not  
4 testimony, that's not evidence.

5 Katz, Fuchs, Latkin, Katzenstein, everyone who  
6 plaintiffs called and some who we didn't, they say the same  
7 thing, because it's true. This one is not a hard one.

8 Yesterday, we went through email after email just so  
9 you could get a sense of what's out there. It wasn't just that  
10 Mr. Bodner attended these partner meetings, he often called for  
11 them. He said we're all meeting now, and he did so at the most  
12 crucial times. April 18, 2013, right before BEOF, demanding  
13 meetings with Nordlicht for hours right before the consensus  
14 solicitation. After the Renaissance sale. Those are all his  
15 meetings. We're meeting, when are you free. Uri Landesman  
16 reaching out to his subordinates, listen, I need notes for this  
17 meeting, forwarding the email to Bodner so he knew that Bodner  
18 would know that he had gotten prepared. It's authority.  
19 That's influence, that is not passive.

20 You heard at the beginning of the case, where's all of  
21 the documents? This really happened, we should see a jillion  
22 emails, but now we know the truth, don't we. He didn't use  
23 email. It's pretty strange in and of itself in this day and  
24 age. You can draw your own inferences as to why.

25 And we have testimony from two of his secretaries.

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1 They acted as his email. Ms. Albanese and Ms. Mullen. If you  
2 look at your screen now, these are emails, these are in  
3 evidence. That's not his email, his email is my email. I  
4 avoided email, he gives a reason why. I don't know. So is  
5 Mr. Huberfeld, so are a lot of people. He testified people  
6 came to see him all the time, they pick up the phone anytime.

7 We also have testimony from Ms. Albanese that in the  
8 midst of this SEC investigation where they set up camp in their  
9 office, she had to move his emails off the Platinum server and  
10 set up that Gmail account.

11 Which leads us to circumstantial evidence. What you  
12 get to see is what actually exists, calendar invites, other  
13 people referencing meetings in which he attended, other people  
14 sending emails about him - all of that is called circumstantial  
15 evidence, but it's exactly the same as direct evidence.

16 That's what you'll hear from the Court. If I were to  
17 walk in from the outside dripping wet and you could see that it  
18 was dark outside and there's rain on the windowsill, it might  
19 be a pretty good conclusion that it's raining. That's all  
20 we're talking about. That's obviously why there aren't  
21 hundreds of thousands of emails, but it also explains why and  
22 how we presented the evidence we have and how we needed to  
23 present it.

24 He solicited investors. We went through a bunch.  
25 Before Bernie Fuchs, there was a PPVA and Mr. Bodner and



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1 Mr. Huberfeld solicited those investors.

2 You heard Mr. Latkin testify -- and if you need the  
3 transcript, this is at page 306, line 21, to 307, line 12 --  
4 that everyone at Platinum Management understood that Bodner and  
5 Huberfeld were the ultimate decision makers. Again, you can  
6 pick it up. So much so that Ms. Albanese, I'm sure she had her  
7 reasons, but in trying to negotiate her severance package sent  
8 an email -- she went to PPVA, at Platinum, sent an email about  
9 Beechwood to threaten him. That's how well known this was.

10 And we're going to come back to the witnesses they  
11 actually chose to call and the witnesses we called separate who  
12 wouldn't be able to testify any differently than Mr. Nordlicht.  
13 This was known. There were inner circles, there were outer  
14 circles, but this was well known. And you heard from a guy who  
15 worked there for six years, Jed Latkin. They installed him as  
16 CEOs of these companies.

17 If you ever wondered how this all works, the masters  
18 of the universe thing, the CEO is actually at the bottom, not  
19 the top. It's the private equity funds they install a CEO  
20 over. So, for example, they installed him at Black Elk.  
21 That's how he knew all that stuff. He worked there for six  
22 months, 20 hours a day. That is one example.

23 We heard the Fuchs' testimony. Pitched to him,  
24 pitched to every one of his investors. They tried to confuse  
25 him on cross. Mr. Fuchs, it's not that hard, I'll admit it,

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1 but they didn't change his testimony, didn't change the core of  
2 it. In fact, guys like Mr. Fuchs are probably the reason these  
3 frauds happen. He still couldn't process everything and what  
4 Mr. Nordlicht had done to him. Sitting here today, he's been  
5 prepped on all of this, he still can't really figure it out.  
6 The fact that they were able to confuse him live, read to it  
7 the way you like.

8 Marcos Katz, the "what the hell is going on" letter.  
9 He was clearly -- it was to Bodner, to Huberfeld. He did not  
10 view the relationship as governed by that little trust  
11 agreement, which is, again, the only evidence of this, that he  
12 had never seen. He had never seen the Mark Nordlicht Grantor  
13 Trust, neither did Fuchs, neither did anyone else, neither did  
14 the employees. That was a little private agreement between the  
15 partners, and it wasn't followed.

16 It is not passive to induce people to keep their money  
17 in funds. It is not passive to set up offices at PPVA  
18 investments, like Agera. It is not passive to go into the  
19 office every day and to have a secretary and to call meetings,  
20 to be part of the process, it's just not. But you don't have  
21 to take my word for it. That's why we called an expert on the  
22 subject who is a hedge fund manager, who's passive, who's not,  
23 and they didn't. Again, read what you like. They had an  
24 opportunity to.

25 Think about that, president of Platinum Management,

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1 this guy, Landesman. Unfortunately, he died. Well, 2016, '17,  
2 something like that. He's the president of Platinum  
3 Management. You see him on TV, CNBC. He's asking permission  
4 from Bodner to tell one of his PPVA's biggest investors about  
5 Black Elk, just process that. We are seeing here in this case  
6 the rung is well above what many ordinarily see it. It's one  
7 of the reasons I find the case fascinating. But he was the  
8 president of Platinum Management, asking permission from  
9 Bodner - not passive.

10 What to invest in? Again, they tried to confuse  
11 Mr. Fuchs a little, but he attended those process selections, a  
12 lot of them. He participated in China Horizon directly.  
13 Mr. Bodner absolutely participated in the investment process,  
14 he knew the assets, he knew the values - that is not passive.  
15 That is not getting a statement in the mail, getting your check  
16 in the mail, whatever your fees rip is, it's not passive, it's  
17 incompatible. He had put on staffing, shtupping, you can make  
18 light of it. That is control, that is influence. It wasn't  
19 one person either. These are jobs with salaries and 401Ks,  
20 real stuff.

21 So you're going to decide soon whose truth is the  
22 right truth. I just want to make sure I'm wearing clothes  
23 because I think there was something about emperors wearing no  
24 clothes at the beginning of this case. Whose truth is the  
25 right truth? You saw the witnesses, you saw the valutors and

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1 the auditors and Joe SanFilippo, Mr. Nordlicht, Mr. Huberfeld.  
2 Whose truth is the right truth?

3 What the Court will tell you is that basically this  
4 case, it's not beyond a reasonable doubt, it's not like TV  
5 criminal law, it's which one is more likely. It has to be one.  
6 One of these truths is more likely. You decide which. You  
7 evaluate the credibility of the witnesses, the actual evidence  
8 and documents in front of you, and the plaintiffs' experts.

9 Now this is hard stuff, but we put on not only a hedge  
10 fund expert, but someone who did their very best to calculate  
11 various forms of quantifiable damages in this case. No  
12 damages, no opposition, no damages expert from them, no hedge  
13 fund expert from them, just nits, technicalities, attempts,  
14 which, frankly, I don't think worked at all. So you can  
15 decide, but there's no opposition, there is no alternative  
16 view.

17 Jed Latkin, he's a serious guy. He testified at  
18 length about Golden Gate, Black Elk, and Northstar. He had a  
19 pretty good view of all three. He was the actual one there on  
20 the ground, he was in California, he was in Texas. He was in  
21 California when Golden Gate fell on its face. In 2010, 2011,  
22 it might have had potential. It's almost like a hand of  
23 blackjack. You don't know when the other card is going to flip  
24 what's going to happen, but once it does, that's the end, you  
25 know what the card is. And you see, that's what we're saying

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1 they did wrong. They pretended there was still potential when  
2 they knew differently, knew, and that's what you saw yesterday  
3 with the valuator and the auditors in those crosses. They knew  
4 differently.

5 And by the way, just so you can follow the thread, it  
6 was they put up this CR -- the first valuator who formed the  
7 CohnReznick audit report, they didn't even call the second  
8 auditor, they didn't. It was BDO until 2013, they didn't even  
9 call CohnReznick who did '14. You will not get to hear from  
10 him. Whose truth is more likely?

11 Mr. Nordlicht, complicated subject because he took the  
12 Fifth Amendment to every question, including silly questions  
13 posed by defense counsel, but does that mean his testimony  
14 would not have been helpful to our side? He was at that  
15 dinner, he knows what he told Nordlicht -- Mr. Bodner, he knows  
16 what he told Mr. Huberfeld, who was in the room. You will  
17 receive instructions as to how to interpret Mr. Nordlicht's  
18 testimony.

19 Mr. Huberfeld, we called him. You think they would  
20 have, but we called him. You know why? Because he was  
21 Mr. Bodner's partner for 25 years. And what you heard him say  
22 is that, first of all, they had a real partnership,  
23 unincorporated, but an actual one, binding, sharing losses,  
24 sharing profits. They have to put up money for an investment,  
25 they have to share losses. When there's a joint project that

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Summation - Mr. Gluck

1 succeeds, they split the proceeds 50/50. This is a business  
2 partnership. And what Mr. Huberfeld said is that he does not  
3 have a recollection ever, over their relationship, withholding  
4 anything from Mr. Bodner. He said one thing, how you got  
5 arrested and why. These are memorable things, not one, not one  
6 thing.

7 Mr. Bodner, on the other hand, suggests that he  
8 doesn't recall Mr. Nordlicht sharing -- excuse me.  
9 Mr. Huberfeld sharing a lot of crucial details. Whose truth is  
10 the right truth? The auditors and valuers we've already been  
11 over. That ain't a defense here, now when you conceal, you  
12 break your promises, not when you're there and they're not.  
13 Think about it this way, when I asked questions yesterday about  
14 show me in the report where it says that Beechwood was playing  
15 the interest. I hope, and only hope, but I hope you all know  
16 exactly what I was getting at. You've been here for 12 days,  
17 this is 12 years, and Mr. Bodner is saying he has no idea what  
18 these things are? Very smart guy, made a fortune in penny  
19 stock trading. Whose truth is the right truth?

20 Joe SanFilippo, CFO. Worked from home, you can judge  
21 his credibility for yourself. He knew things and didn't pass  
22 them along. In fact, that was the *modus operandi*. That was  
23 the very conspiracy that we are suggesting existed -- Huberfeld,  
24 Nordlicht, Bodner, and for the purpose of this release,  
25 Platinum Management, as well, because the reason why you don't

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Summation - Mr. Gluck

1 include the company for the release -- doesn't matter why.

2 They intentionally did this overvaluation to get fees.  
3 It isn't that complicated a story. They knew better, and yet,  
4 every month, they were pretending there were tens and then  
5 later hundreds of millions of assets that weren't there, and  
6 they knew it. That is a breach of duty and Mr. Bodner is  
7 liable for it.

8 They did call one guy, David Steinberg. Let's talk  
9 about David Steinberg's testimony. He joined as an intern, not  
10 in the inner circle, barely knew anything, had heard of  
11 Northstar maybe, never worked at Black Elk after 2012, had  
12 nothing to do with Golden Gate. That's who they chose to call.  
13 He made his first pitch to Mr. Bodner as a junior portfolio  
14 manager, and he was not aware that Mr. Bodner had real  
15 professional responsibilities. But isn't even that weird? Why  
16 is the junior kid in the company making his first pitch to some  
17 passive investor? They suggest that he was the chief risk  
18 officer, which probably was true by 2016, but you saw an email  
19 about that. You saw an email from Mark Nordlicht to Uri  
20 Landesman saying he was scared out of his mind because Seth  
21 Gerszberg, who you met, had taken over the Kerry Propper role.

22 Now, Seth Gerszberg is a failed T-shirt seller. Kerry  
23 Propper, there's evidence in the record, was a buddy of David  
24 Levy, Huberfeld's nephew, same age. In 2014, after the SEC  
25 camped out in their offices, the COBA investigation began and

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Summation - Mr. Gluck

1 Mr. Nordlicht left with his family to Israel, not permanently,  
2 but with his family and was not residing here. And at that  
3 point, those that remain were there, and that included  
4 Mr. Steinberg who, as of January 2016, when he wrote that  
5 rachmanus email and helped Mr. Gerszberg with that  
6 presentation, he delivered to Huberfeld and Bodner, feels quite  
7 strongly about it, his thesis anyway. That is when David  
8 Steinberg was chief risk officer. He said he was looking for  
9 another job because there was nothing for him to do, there was  
10 no money to invest. That's who they chose to call.

11 Very briefly, because I know -- I hope you already  
12 know this. You did not hear from David Levy, Naftali Manela,  
13 or Daniel Small. Those are figures, you saw them on the  
14 emails. Naftali Manela, CFO, David Levy, co-chief investment  
15 officer with Nordlicht to the side of the -- They were not here  
16 because they would have testified the same way Mr. Nordlicht  
17 testified. The reality we are in.

18 Now, Mr. Bodner did testify and you will need to judge  
19 his credibility against emails and evidence referencing powers  
20 that be. He says that all this time over 12 years, all he  
21 discussed was liquidity. Just, what do you need for the  
22 fund -- And even if it's possible, which is more likely, that's  
23 all you're being asked to decide. I didn't solicit investors  
24 when we're showing you a meeting with an investor and then a  
25 subscription agreement the next day where he's copied on both --



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Summation - Mr. Gluck

1 which is more likely? Didn't Noah talk about values when you  
2 got Mr. Katz's testimony saying he was always talking about  
3 values to me, as the investor, pitching the fund. At Agera, he  
4 was all upset about China Horizon. Should we bring a  
5 litigation, this and that, and he's saying nothing but  
6 liquidity. He's trying to suggest that, over these 12 years,  
7 that all of this talk had to do with the meetings, had to do  
8 with his charities and his little side investments, but these  
9 were PPVA investments, that was the primary investment. He  
10 arguably claims that he had side investments. I'm going to  
11 show you an interesting slide in a second, but he didn't  
12 present any evidence, not a document, not even a document as to  
13 how he capitalized the fund. He says that when everything went  
14 down, he had \$40 million in it, but that was the worthless LP  
15 interests. That was \$40 million of what Platinum Management  
16 was valuing the stock they gave him over the years, that was a  
17 zero. In July, Mr. Trott took over. Credibility.

18 I asked him if he knew what Beechwood was, and at  
19 first he thought they might be a reinsurance company, maybe he  
20 had one or two meetings. Went through quite a few emails  
21 yesterday and that was a subset of direct meetings with the two  
22 chief guys at the reinsurance firm that he owned. Whose truth  
23 is more likely? This whole PPVO PPCA move is just that. We  
24 saw that they were discussed in the same breadth, shared an  
25 office, co-invested in investments, PPVO is going to do this,

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Summation - Mr. Gluck

1 PPCO is going to do this, and they're trying to say that this  
2 particular thing wasn't a PPVA thing, so you shouldn't think  
3 anything about it. You can judge for yourselves whether those  
4 two entities in particular were unified. We have expert  
5 evidence that Beechwood and Platinum shared officers,  
6 directors, ownerships -- excuse me. Officers, ownership,  
7 control. That's what Mr. Post testified. Couldn't even say  
8 the words, but he testified about the characteristics about  
9 Beechwood and Platinum.

10 Again, who did they choose to call? David Steinberg,  
11 somebody who basically knew nothing about any of the issues,  
12 certainly on valuation related to this case. Yes, Platinum was  
13 a real company, there were people there, and they made real  
14 investments. They failed, though, and that's the issue for  
15 this case. And then it was so obvious that they failed that he  
16 wrote up these little email saying, read these Excel  
17 spreadsheets in order, they tell a story, and those  
18 spreadsheets are our story, basically, except he didn't realize  
19 that the oil and gas investments were not just encumbered, but  
20 actually worthless, it's worse than he thought, and that's who  
21 they chose to call.

22 Mr. Bodner suggested that his lifelong friend --  
23 excuse me. Partner. Mr. Huberfeld got arrested. The first  
24 thing he heard of any of this was the day of the arrest. And  
25 then his response to being asked why he sent an email and made

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Summation - Mr. Gluck

1 a phonecall to Jonah Rechnitz on the day of the bride payment  
2 check cutting was "I don't remember."

3 He claims he has almost no knowledge about these  
4 Black Elk Opportunities funds. There, he was certainly a  
5 passive member. He got fees, he solicited the investors, he's  
6 on the emails, he's in the office in the all-hands emergency.  
7 They raised \$95 million, it's a lot of money, doesn't remember  
8 much about it. Same thing with Black Elk, doesn't remember  
9 much.

10 Here's the issue, I'm not going to go through the  
11 overvaluations, but what I'm going to ask is as we do, you keep  
12 this fiduciary thing in the back of your head because I'll show  
13 you the emails that he's on related to these overvaluations,  
14 related to his knowledge about it, but none of that, in  
15 addition, I can put it all in this section, none of that is  
16 consistent with being this passive investor.

17 We spent some time looking at that April 2016 NAV  
18 sheet. Real people put their pension money into this thing,  
19 they get their statements in the mail - they're passive. Their  
20 shares were worth a share of \$720 million, and it was a dead  
21 lie, it was a dead lie and they knew it was. It was wrong.  
22 And he knew that it was untrue because he got these exact same  
23 NAV sheets. He flew out to Mexico, after he supposedly  
24 disassociated himself and got this release, to tell Marcos Katz  
25 that everything was going to be fine, he should keep his money

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Summation - Mr. Gluck

1 in the fund.

2 Naftali Manela couldn't be in this trial, but here we  
3 have David Steinberg who, again, is there at this point,  
4 sending this email. We call it the rachmanus email because  
5 it's a colorful word. It's a Yiddish word that means mercy.  
6 They're saying when someone like Mr. Trott gets appointed,  
7 they're not going to care that Beechwood is calling these  
8 loans. He's going to say you're not getting any money, no  
9 mercy on Beechwood. That's what a guy like David Steinberg can  
10 take one look at this and say, if this thing goes into  
11 bankruptcy, big problem. And he attaches three Excel  
12 spreadsheets, potential winners, those which aren't potential  
13 winners, which is most of the fund by value anyway, and then  
14 these debts.

15 Now, Mr. Gerszberg was of the opinion that they were  
16 over-collateralized. He was a T-shirt seller who was there for  
17 a week. What we of course know is that if they were  
18 collateralized by the Golden Gate assets by the Northstar  
19 assets way under collateralized, and this debt was even worse  
20 than David Steinberg's.

21 And then what happened? He wrote this email and,  
22 effectively, not every letter, but most of it became a Power  
23 Point presentation that Mr. Gerszberg personally delivered to  
24 Mr. Bodner and Mr. Huberfeld, just like I'm doing now, I  
25 assume. We had to call Mr. Gerszberg Because Mr. Bodner and

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Summation - Mr. Gluck

1 Mr. Huberfeld don't remember this thing happening. We know  
2 that Mr. Gerszberg felt very strongly about his  
3 over-collateralization thesis, but he presented it, and in that  
4 presentation, half the fund is missing. There's \$40 million  
5 total that's unencumbered and it assumes a \$300 million  
6 valuation of just Golden Gate and Northstar. They were zeros.  
7 So it's much more than half the fund is missing.

8 And they get this presentation and they didn't pick up  
9 the phone. They get the NAV sheet the next month that was  
10 completely contradictory to it, he didn't pick up the phone and  
11 tell anyone. He knew about the overvaluation, he didn't  
12 disclose it, he's a fiduciary, that's the end of the case on  
13 liability. That's it. It's a simple task. It's why we could  
14 do it in 12 days and not 120 days.

15 There's only one extra question. If you also find  
16 that at then or anytime thereafter there was an implicit  
17 understanding or an explicit understanding between him and Mark  
18 Nordlicht and Mr. Huberfeld, for example, when they flew out to  
19 Acapulco to see Mr. Katz to cover this overvaluation up, then  
20 it's all the damages back to 2012. That will be what the Court  
21 says. And if that's the end, that's the end. And if you don't  
22 find the conspiracy, then you're going to decide exactly when  
23 he knew, that's it. That is the way this will --

24 You heard Mr. Post state that the fund was  
25 catastrophically overvalued and Quintero quantified it, but the

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Summation - Mr. Gluck

1 math isn't that hard. When, in April 2016, their top assets  
2 include zeros, like Northstar, like Golden Gate, like Seth  
3 Gerszberg's company, which was shut down and bankrupt and he  
4 was working there, not running it - the clothing company - how  
5 is it \$30 million? It's crazy.

6 And here's what's interesting, when you get to  
7 Mr. Quintero's testimony, he didn't even take that into account  
8 on his value estimation, he didn't. He didn't even take the  
9 undisposed debts into account. All he said on this management  
10 fee side, the 2 percent, if you just look at six assets over  
11 time, it's at least 15 million bucks. That's a lot of money to  
12 take. Now, you're going to decide for yourselves what the  
13 exact, what the amount should be, when there would have been a  
14 run on the bank, people actually learned the truth.

15 Let's go through what happened.

16 Beginning in 2012, management fees get paid every  
17 month, right, but until then, the fund went up. Platinum  
18 Partners got a slice, 20 percent. Here's the problem, oil  
19 starts to drop in 2012, it's part of Mr. Quintero's chart if  
20 you want to take a look at it, and Black Elk specifically,  
21 their biggest investment, they're valuing a common equity of  
22 more than \$200 million. That's a lot. It has its own internal  
23 problems, so oil down and problems.

24 Now, the bond rating companies, this isn't common  
25 equity level, this is secured debt. They drop them to jump ons

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Summation - Mr. Gluck

1 saying there is only a 70-percent chance of recovery. That's a  
2 disaster. If that would actually happen in the economy,  
3 terrible. There are real implications when you're just a  
4 shareholder and you get a piece of the upside, but you also get  
5 a piece of the downside when there are these sorts problems at  
6 the company. This is before the explosion.

7 The explosion, though, was the nail in the coffin. It  
8 was the worst oil explosion in the Gulf since BP. It was on  
9 the news, people died, there were criminal investigations,  
10 Black Elk itself was in parts of all sorts of litigation around  
11 it where the lawyers might have been paid for, but not the  
12 liabilities. That was going to be Jed Latkin's job when he  
13 testified about talking at that room full of people all wanting  
14 to know what happened, exactly why what happened. This was  
15 serious stuff.

16 And because of the proportion of PPVA's portfolio that  
17 was this Black Elk common equity, we don't need to figure out  
18 what the NAV actually was. It didn't go up, it didn't go up,  
19 incentive fees are a zero. It's that simple. Incentive fees  
20 weren't a zero. He was part and in the office for those  
21 all-hands-on-deck meetings. They decided to take extraordinary  
22 actions with these BOF funds and it doesn't even matter how  
23 they resulted. He knew. It would as a zero and he took the  
24 money anyway. In fact, this money went directly into his  
25 pocket, him and Nordlicht and Bodner and Mr. Huberfeld. These

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Summation - Mr. Gluck

are incentive fees.

(Continued on next page)



Mcf2Pla2

Summation - Mr. Gluck

1 MR. GLUCK: You look at the Black Elk Northstar story.  
2 You all figured out in 12 days. I'm not sure why the auditor  
3 didn't understand it until three weeks later. But again, you  
4 can make your own judgments.

5 Black Elk, after this disaster, sold most of his  
6 operations and assets for \$115 million. It was real. Gross.  
7 It wasn't 700 million. \$115 million. They took the leftovers,  
8 the remnants, and combined with a little low increase start-up,  
9 you can see it from the audit papers, these other lands that  
10 were undeveloped, they called it Northstar.

11 And Latkin, who did the deal, who oversaw the deal,  
12 2015, he is the CEO, called it a liability. It was a play.  
13 There is still metal in the ocean. There is abandoned  
14 liabilities. You shift it off to someone else to see if you  
15 can get some of the money from the bonds back.

16 They are valuing the common equity 190 million? When  
17 there is 80 million of secured bonds that were never going to  
18 get paid? It's April of 2016. They knew that was wrong.

19 Mr. Bodner apparently decided to call Mr. Steinberg,  
20 Mr. SanFilippo, an auditor and valuator to say there was no --  
21 you are wrong. No overvaluation here and nothing to see.  
22 Look. The explosion was on TV and it was disclosed in their  
23 public SEC filings. We couldn't have been wrong as a result.  
24 It's not a defense.

25 Mr. Bodner knew differently. Same reason you know

Mcf2Pla2

Summation - Mr. Gluck

1 differently. You have been here six hours a day for 12 days.  
2 He was at Platinum for 12 years. Every one of those meetings,  
3 working through every one of those crises, talking to every one  
4 of those investors. Which truth is the right truth?

5 These valuator, they just take the information  
6 Platinum Management guy Joe SanFilippo gives them and they  
7 write it down on their own letterhead. They didn't go to any  
8 of these sites. They didn't review the financials. They take  
9 a memo, they read it, they decide if it's not unreasonable or  
10 whatever that phrase was, and then say nobody should rely on  
11 this and then hand it over. That is not a defense. Not when  
12 you know better.

13 They make a big deal about these reserve reports. But  
14 at least as to Golden Gate they really had at least one  
15 completely different reserve report. They are trying to say,  
16 well, because Black Elk wanted to push down the price? They  
17 control Black Elk. They installed Black Elk's CEO. This was  
18 all done while at Platinum. Not a word to the valuator, not a  
19 word to the auditor, not a word to the investor.

20 We have testimony in the record stating Bodner talked  
21 about valuations all the time. We have testimony in the record  
22 where there is a big kind of public fight in a restaurant here  
23 in New York City where Bodner is saying the fund is mismarked.  
24 At that same dinner there is testimony in the record that he  
25 issued a directive that as a result, something internally hit

Mcf2Pla2

Summation - Mr. Gluck

1 him, we shouldn't take incentive fees anymore. But that's not  
2 good enough. You can't charge management fees in the meantime  
3 and then let people lose their money. It shows control and  
4 knowledge, not a good deed.

5 Instead, they set up Beechwood, camouflaged this whole  
6 thing. They don't tell anyone that their operating companies  
7 can't even make the most basic thing they need to make, which  
8 is their interest payments. And he knew about those interest  
9 payments because we showed you e-mails where he is getting them  
10 (inaudible).

11 And the response to all of this is, let's be clear, is  
12 just I don't remember or it didn't happen from the guy at  
13 issue. It doesn't jive. It doesn't jive with Latkin's  
14 testimony when he is talking to the president of PPVA saying  
15 I'm going to dinner with Bodner. I need this information. I  
16 promised I'm going to tell him this about Golden Gate. And we  
17 need a better team in there etc., etc.

18 They tried the vertical drilling. They tried the  
19 horizontal drilling. Latkin was there. He is telling the  
20 president of Platinum these things. And the president of  
21 Platinum is saying: I'm going to go to dinner with Bodner now.

22 Latkin was on the ground. Latkin talks to Landesman.  
23 These partner dinners, just so everyone remembers, are  
24 Landesman, Bodner, Huberfeld, and Nordlicht. That's the  
25 testimony in the record.

Mcf2Pla2

Summation - Mr. Gluck

1           No suggestion in April that Platinum knew that their  
2           own bonds in Black Elk were impaired. They knew better. It's  
3           only 21.5 million, but it's a pretty good example.

4           Just think. Think about all that that means. They  
5           knew about the Northstar thing. They knew about the  
6           subordination that has caused all these problems, that the  
7           money didn't even go to the bondholders. The bondholders were  
8           left holding the bag, and they are still marking them at full  
9           value.

10           You heard Jed Latkin became the CEO of Black Elk and  
11           had to testify in front of all these people about what  
12           happened. That explosion fundamentally changed the business.  
13           No longer was it just about oil prices. It's more expensive,  
14           more oversight, more regulation, more environmental stuff.  
15           That's the testimony in the record from the person on the  
16           ground.

17           This is also in the record. Doesn't remember.  
18           Surprised to see it. But the day of the explosion, and it  
19           certainly seems that an anxious David Bodner is asking for him  
20           to be called right away. He needed to know how much more we  
21           have to pay the Black Elk investors. He knew then. You can  
22           find this conspiracy went in Acapulco after 2016, but he knew  
23           then and didn't say anything. He took the fees anyway.

24           Testimony in the record from Mr. Quintero is that  
25           after that explosion, the value of the stock, the common equity

Mcf2Pla2

Summation - Mr. Gluck

1 in Black Elk was worthless. Valuing it at 200 million.

2 The bonds they also had, they had some value probably  
3 at this time. But that's not the pecking order. The stock,  
4 the common stock, the stuff that goes up and down on their  
5 success, this is called a wipe out. You admit it, you move on.  
6 You don't cover it up the next four years.

7 Instead, they take extraordinary action, they call it  
8 a one-off. They raise \$95 million, which is real money, to set  
9 up these BEOFs and they do inject that money into Black Elk but  
10 it didn't work. The point is not whether it worked or not.  
11 The point is whether they knew. This was an emergency. This  
12 was extreme. If this didn't work, big problem. They are  
13 marking it no risk, no problem.

14 By the way, while these BEOFs did get paid out first  
15 ahead of everyone, even if they were going to get paid the way  
16 they were supposed to, the BEOFs were preferred. Mr. Post  
17 testified that. Mr. Quintero testified that. They are above  
18 PPVA's common equity in the pecking order. They had to be paid  
19 back first. That doesn't work. Not with a \$200 million  
20 valuation. And that's why the NAV didn't (inaudible). That's  
21 why Mr. Quintero was so certain about it.

22 Now, it's not just that he is in the office.  
23 Mr. Bodner oversaw at least some of the very effort to solicit  
24 investors. He proofed Mr. Fuchs's e-mails that Fuchs would  
25 send out to his investors so that they would invest in this.

Mcf2Pla2

Summation - Mr. Gluck

1 Mr. Fuchs testified that Bodner authorized and directed him to  
2 seek out investors for BEOF. We don't have a lot of e-mails,  
3 but we have some, and they clearly show what happened. There  
4 is paper and there should be more, but for the way Mr. Bodner  
5 conducted his business.

6 Bodner called a dinner shortly after -- partner dinner  
7 shortly after the Renaissance sale. No question that it  
8 happened. No question what the price was, even if I jam it up  
9 in talking live, no question, but 110, 115 million. That was  
10 it. 110, 115 million. Actually there were more creditors than  
11 that at Black Elk. That's why Quintero was saying it was  
12 insolvent. That does not account for paying back BEOF  
13 preferred equity and certainly does not account for the common  
14 equity.

15 The reality is that in April of 2016, when that NAV  
16 statement went out, it was almost inconceivable that it was  
17 (inaudible). But yet they flew to Mexico anyway. Mr. Bodner  
18 denies that the overvaluation happened, so he certainly did not  
19 tell Mr. Katz about the overvaluation then. They all flew down  
20 together. Huberfeld, Nordlicht, Fuchs, and Bodner. Even if  
21 you only found an implicit understanding about what they were  
22 going to do then, all of the damages are in this case. But, as  
23 we have shown you, the day of the explosion he calls up  
24 anxiously, set up BEOF, right after. Both in here.

25 I didn't see in any reports indicating that the --

Mcf2Pla2

Summation - Mr. Gluck

1 pretty much the head investment person at Platinum was cringing  
2 at the purported Golden Gate PV10 number. Of course they tried  
3 the drilling. Did not work. Right around 2013. By the end of  
4 2014-2015, you could go there, there was no one home. I made a  
5 joke about that the valuator said there is a new management  
6 team. Who? There was no one there. They were trying to  
7 combine it with Black Elk, and they were going to call it  
8 Golden Gate, but it never happened, and that valuator put out a  
9 value of that company anyway. There was no such company.  
10 Auditor, valuer, it's not a defense when you actual know. It's  
11 smoke.

12 Bottom line, this same equity they are valuing 110  
13 million sold for less than 3. That's what they bought. After  
14 the failures. They are trying to say there is all sorts of  
15 incentives, but you can't make it work. They knew this.  
16 Platinum testified about it. Inaudible) testified about it.  
17 The auditors had no way to explain it.

18 This one is interesting because this is not April  
19 2016. This is April 2015. Trying to point to all this oil in  
20 the ground. Losing the leases. Interest payments have to  
21 people come in and foreclose or you don't if you are Beechwood  
22 and you are actually owned by Platinum and you sit on the deck.  
23 That's the debt stability scheme. (Inaudible). They didn't  
24 have the oil in the ground. They couldn't have put money in to  
25 drill, and they knew it. Lots. And they are denying the

Mcf2Pla2

Summation - Mr. Gluck

1 valuation to this day. Overvaluation.

2 I think we have gone over Northstar, but you have got  
3 the guy who sold Northstar its assets as CEO of Black Elk  
4 saying Northstar was a liability on asset. There is no  
5 contrary testimony, not even a word, not one word from the  
6 auditors. David Steinberg had heard of Northstar. There is  
7 nothing in the record to contradict this other than these  
8 valuation reports, and you can judge them for yourself. They  
9 are pieces of paper, just like that Mark Nordlicht Trust is a  
10 piece of paper, and this is the real world. Because the piece  
11 of paper says something, it doesn't make it true. It doesn't  
12 make it true that Mr. Bodner was a passive investor and it  
13 doesn't make it true that Northstar was worth \$200 million.

14 In the record. Not going well. Where's the  
15 disclosure? This is only more likely than not. He should have  
16 disclosed it. Whose truth is more likely here?

17 Here it is. December 28, 2015. About two weeks from  
18 those e-mails where he says Beechwood and Platinum are going  
19 down. This is judgment week. He signs that Nordlicht side  
20 letter. You heard testimony about what a side letter is. It's  
21 a 40 million, nearly 40 million undisclosed liability. This is  
22 why. Because remember that emergency with Northstar where they  
23 were going to miss an interest payment get him on the phone,  
24 everyone is going to figure this out. This is a lot worse than  
25 an interest payment. They said that when Beechwood bought the



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Summation - Mr. Gluck

1 debt, and it's it absolutely true, that the Golden Gate  
2 maturity, the actual principal, you know, the 30 million, not  
3 the interest, that was coming due in November of 2015. It had  
4 been extended for two years. By this time it had defaulted.  
5 And suddenly the game was up. Beechwood, which had been  
6 sitting on this bad paper, and it's a good thing for a case,  
7 bad paper, Nordlicht Grantor Trust included, suddenly they  
8 couldn't anymore. They were supposed to get not a check for  
9 400,000, but a check for 38 million or whatever the principal  
10 was and there was no money. There was no money at Golden Gate.  
11 There was no operations at Golden Gate.

12 PPVA didn't have it either. Directs that they shut in  
13 all the profit -- unprofitable fields and signs an agreement,  
14 this Nordlicht side letter, saying he will take money from some  
15 of the other assets when it comes in and either buy back that  
16 Golden Gate debt, which is worthless, or repay. Mr. Quintero  
17 did not testify about the damage from that, 15 million straight  
18 line analysis for the incentive fees. It's a reason why NAV  
19 sheets are wrong.

20 China Horizon. Mr. Quintero didn't testify about  
21 either. Bernie Fuchs did. Mr. Post did. There was a problem.  
22 These things happened. Okay. Chinese government breached  
23 their deal. You don't put out -- card had been flipped over.  
24 You lost the hand or you might have lost the hand. Very  
25 material either way. Valuator just going up though. Not

Mcf2Pla2

Summation - Mr. Gluck

1 included in Quintero's 15 million of management fees or  
2 incentive fees.

3 Another one, this is the Gerszberg clothing company.  
4 Remember they made the presentation that he was in the office.  
5 He wasn't offering any companies. He was in bankruptcy.

6 November 2015, they are valuing \$22 million. These  
7 are lies. Mr. Bodner met with him in Mr. Huberfeld's home.  
8 Gerszberg gave Mr. Bodner that presentation. Not in  
9 Mr. Quintero's damages chart. In the April 2016 NAV statement.

10 You can take your pick. What we tried to do, and you  
11 may recall this timeline from the beginning, it hasn't changed  
12 an iota, these are all points in which there are clear  
13 evidentiary bases to find that Mr. Bodner knew that there had  
14 been an overvaluation, beginning with Black Elk, the 200  
15 million common equity.

16 And they raise BEOF. BEOF formed the funds and they  
17 subordinated.

18 And they formed Beechwood. They discussed the  
19 Beechwood terms, and they are going to get the money from the  
20 Beechwood insurance companies and allocate it to PPVA and buy  
21 that debt.

22 And we have e-mails where they are saying: I am in  
23 the insurance guy's office. I am taking Bodner and Huberfeld  
24 through the allocations. This was very conscious. There are  
25 e-mails showing the interest payments (inaudible). Any one of

Mcf2Pla2

Summation - Mr. Gluck

1 these qualify for knowledge that transferred to Beechwood.

2 SEC rolls into the office five months or whatever it  
3 was. Period of time. Many days.

4 The dinner. The fighting about the NAV, fighting  
5 about the marks, no incentive fees. There is demands from  
6 Beechwood that PPVA buyback the Black Elk bonds which happened.  
7 That's Scott Taylor saying I know how to get what I want and  
8 what Bodner wants at the same time. These are all (inaudible).

9 And you get to that Gerszberg presentation, which is  
10 plain as day, just nothing else to say, but the NAV sheets keep  
11 rolling out. He took the trip to assure Mr. Katz anyway. They  
12 knew.

13 This is a Nordlicht e-mail to Bodner and others in  
14 evidence. Judgment week. This is just after that Golden Gate  
15 principal was due and eventually (inaudible). This is a  
16 printout from the presentation. This is the salient page, the  
17 PowerPoint. It's incompatible with the NAV sheets.

18 But what's crazy about it is it's valuing the  
19 Northstar and the Golden Gate investment at full value. These  
20 are saying the debt alone is a problem. The presentation was  
21 given to Murray Huberfeld, David Bodner in Murray Huberfeld's  
22 house. Those debts, Seth Gerszberg, the e-mails leading up to  
23 this, the e-mail saying I am getting this ready for Huberfeld  
24 and Bodner even says what we need from Huberfeld and Bodner in  
25 the slide neither Mr. Huberfeld or Mr. Bodner remember.

Mcf2Pla2

Summation - Mr. Gluck

1 Mr. Gerszberg sure does.

2           Talked about the dinner regarding the NAV. This is  
3 both knowledge now, and remember I asked you to think about  
4 fiduciary. It's hard to reconcile. This is not what a passive  
5 person does. It's not. Post says, common sense also tells you  
6 that. Passive person gets their checks in the mail. Maybe  
7 after a long period of time they might send their grandson in  
8 to the office to see what's going on. Not this. Not over 12  
9 years.

10           David Steinberg sent Mr. Bodner's secretary, both of  
11 them, Huberfeld, a report from this Renaissance group, which  
12 significantly undermines any contention continuing valuing. He  
13 knew. Take a point. We ask that it be November of 2012, or if  
14 you find at any one of these points BEOF setting up Beechwood,  
15 the interest payments, to getting the presentation, to jumping  
16 on the plane to Marcos Katz, it is implicit and our express  
17 understanding, and then, frankly, the points don't even matter.

18           This is what Mr. Bodner was an owner of. This was  
19 sent to Mr. Huberfeld. This was forwarded to Bodner, I  
20 believe. They talk about everything together. This a part of  
21 their partnership. They have this big partnership, right, they  
22 have all of these projects. This was one of them. There is  
23 direct testimony about that. This was planned. Nordlicht  
24 group. It's Nordlicht, Bodner, and Huberfeld. They are going  
25 to run the investment allocation. We then see Mr. Bodner in

Mcf2Pla2

Summation - Mr. Gluck

1 their office going through those very same allocations. These  
2 same, in contrast, to be fair, it was about allocating to  
3 different things, not about this. Which is more likely?

4 The reason you see NManela@Beechwood.com is there was  
5 sort of rotation of employees. There was a period when  
6 actually Naftalis Manela had a Beechwood address. There was  
7 Beechwood offices. Just a contextual thing. But whose truth  
8 is more likely.

9 Mr. Bodner states that he did not solicit investors  
10 for Black Elk opportunities. This seems to suggest  
11 differently. Attended partner dinners, information for those  
12 partner dinners, there was a fight at the partner dinner. That  
13 was where the raw information—that's a term used by  
14 Mr. Latkin—was discussed. What really happened at  
15 Golden Gate?

16 So now we get little bit of law on EBITA very quick.  
17 This is what I am talking about when I am saying you can find  
18 the date of the breach or any time during this period you can  
19 find that there is an implicit or an express understanding and  
20 agreement between Bodner, Huberfeld, and Nordlicht in which  
21 case damages go back to 2012. The judge is going to instruct  
22 you on this and it's literally -- the top part is a copy-paste,  
23 and tried to simplify even further, and I hope I did a good job  
24 on the second bullet. Give you the implication from the book.

25 It will all point to the agreement. Every time they

Mcf2Pla2

Summation - Mr. Gluck

1 do a partner agreement and they don't change the NAV when they  
2 know things are wrong. Raising an emergency BEOF fund. Know  
3 things are wrong, that that money is going to come in ahead.  
4 By the way, PPVA also guaranteed it. Another problem. Doesn't  
5 even matter.

6 Capitalizing Beechwood, allocating the Beechwood  
7 investment, paying the interest, not disclosing problems after  
8 that dinner, flying to Mexico in May and June 2016 when  
9 everything was not right and not saying a word. They couldn't  
10 have said a word because that would mean that the overvaluation  
11 happened. Numbers are huge. On that April NAV sheet all you  
12 do, and I will explain where this is Quintero opinions, and  
13 then where is a fact opinion. Northstar Quintero zero, post  
14 zero. Likely Latkin zero. Black Elk bonds Quintero  
15 substantially impaired. Golden Gate multiple witnesses. Both  
16 post Quintero. Latkin zero. China Horizon big problem.  
17 Chinese government broke the deal. Desert Hawk. Quintero.  
18 Impaired. Problems. Not valued what it says. Over everything  
19 14 million. That's Seth Gerszberg (inaudible). Wasn't in  
20 operation. Not part of (inaudible).

21 This whole Nordlicht side letter, they are saying that  
22 this liability was baked into Golden Gate's financials. But  
23 you can't subtract 40 million from nothing, and it was a  
24 nothing. We saw the e-mail where Nordlicht would be shutting  
25 the fields. We heard testimony. There was no one there. They

Mcf2Pla2

Summation - Mr. Gluck

1 lost the leases. You can't subtract 40 million from nothing.  
2 PPVA suddenly had that obligation to pay an issue, among many,  
3 which Mr. Trott had to deal with and their colleagues when they  
4 started to unwind this. It is an undisclosed liability.

5 My rough NAV, that little squiggly line means  
6 approximate, approximately 25, 457 million. Wait. There is  
7 only 700 million, and then there were a whole bunch of  
8 disclosed liabilities, right? All the redemptions. 100  
9 million. Katz asked for his 50 million back. There was the  
10 collateral account. It's almost nothing. Not a small thing.  
11 There was nothing there. And that is ultimately of course like  
12 Mr. Trott's appointment into bankruptcy, the equivalent in  
13 Cayman of bankruptcy, official liquidation. Mr. Trott, the  
14 joint official liquidator. He has a joint person. He is  
15 sitting Cayman now. The fiduciary of the Cayman court,  
16 appointed by the Cayman court to do exactly this, by the way,  
17 to investigate what happened, to realize the assets, dispute  
18 any improper debts, for example, in the Nordlicht side letter,  
19 and then bring litigation against those who are responsible.

20 If you find that there is liability, then there is  
21 also the question of damages. That is also your job  
22 unfortunately.

23 Incentive fees. These are that 20 percent cut where  
24 we presented the evidence. There was no rise beginning in  
25 2012, so the math is super easy. It's a zero. Incentive fee

Mcf2Pla2

Summation - Mr. Gluck

1 was paid, shouldn't have been paid. 5 million goes directly  
2 into Mr. Bodner's pocket. 1.8 million of that, what is that?  
3 COBA money? Union pension fund? And Mr. Quintero testified  
4 based on bank statements—this isn't hard stuff—you can see  
5 total cash for redemptions going out to PPVA, this bank  
6 account, our bank account, \$30,773,579. Not a penny should  
7 have. That simple.

8 On your verdict form there is going to be a special  
9 place for your overall amount of damages and then a very  
10 special place for 2012 incentive fee damages. They are going  
11 to ask you how much of the total damages are purely due to 2012  
12 incentive fees. Shouldn't be paid again the conspiracy will  
13 probably moot that issue or not, but that will be your job,  
14 too.

15 Mr. Quintero relying on bank statements, working with  
16 the accountants employed by Mr. Trott, found 30,773,579. The  
17 math is not and was not that hard.

18 Management fee is more complicated. This is that two  
19 percent. If you are taking 2 percent and 100 percent is  
20 write-off you are taking too much. That's all it means. Now,  
21 that's a more difficult task Mr. Quintero had. He was trying  
22 to figure out exactly how quickly, how fast, what rate the  
23 value of the assets went down, the NAV went down. Very  
24 difficult task. He simplified it. There is only looking at  
25 six assets, not including China Horizon, not including Over



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Summation - Mr. Gluck

1 Everything, Chinese company, not including Chinese company, not  
2 including the clothing company, not including any of this  
3 undisclosed debt. He just looked at six assets and said, by  
4 those alone, if I give every inference, if I give every  
5 inference to Platinum Management, including that the  
6 valuation's right to begin with, and they didn't suddenly go  
7 down like due to an explosion, but just basically draw a  
8 straight line from March 2016, there is \$15 million of  
9 overpayment under this method. And he looked -- hundreds of  
10 hours looking at each individual -- just these six. He assumed  
11 that all of the other hundred or so were 100 percent valued and  
12 didn't incorporate the debt issue at all, didn't incorporate  
13 the clothing, the Gerszberg company, didn't incorporate the  
14 China Horizon. That number that he found with his straight  
15 line was 15 million. During the whole period, 46,434,428. He  
16 says 15 million at least was (inaudible). You can decide what  
17 the damages are. He did testify, Mr. Quintero testified, that  
18 in the event of the disclosure there likely would have been a  
19 run on the bank. No numbers, no when. You get the pleasure of  
20 doing that.

21 But that is how damages are to be calculated. You  
22 will be asked for two numbers. One is an overall damages  
23 number and then the second, if there is an overall damages  
24 number, how much of that is just due to incentive fees in 2012.  
25 The sub issue. We have tried to make this as easy as possible.

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Summation - Mr. Gluck

1           Last issue. This release. You heard a lot of  
2 testimony about it; that as of now today the issue had been  
3 simplified for you.

4           This agreement, the only reason it could possibly bind  
5 the fund is because Mark Nordlicht signed it on behalf of  
6 Platinum Management. Undisputed. You have a binary choice.  
7 If you find that Platinum Management or Mark Nordlicht  
8 overvalued PPVA, this release is invalid because Mr. Bodner's  
9 charge is breaching his duty and failing to disclose the  
10 overvaluation of PPVA.

11           So if you find the overvaluation, release out. It is  
12 as simple as that.

13           Platinum Management was a defendant in this case.  
14 They litigated the matter for 15, 18 months and then just  
15 stopped. And a default has been entered against them. Now  
16 it's not a hundred percent binding, but you can consider that.  
17 There is a default against them. They can't contest it. They  
18 stopped litigating. They defunct. Platinum Management is  
19 clearly defunct.

20           You heard Mr. Nordlicht's testimony. You can review  
21 public record, take notice of this default. The release is  
22 invalid. It's obvious. Can't release someone for the thing  
23 you did, otherwise it would be no good. It's against public  
24 policy. That is the concept.

25           At minor points that have lost their dispositive

Mcf2Pla2

Summation - Mr. Gluck

1 relevance but were presented to you, it was sought by Bodner  
2 and Huberfeld, post SEC investigation, both COBA and subpoena  
3 investigation, they are requesting covers for specific  
4 liabilities which Mr. Bodner contends was a gift tax charity  
5 issue, but then in the same breath talks about -- or his  
6 lawyers are asking about litigation and that Platinum  
7 Management should cover all the same. There is a request that  
8 Mark Nordlicht personally indemnify everyone, and he responds  
9 that he can't be personally responsible for their misconduct.

10 And then to top it all off, the terms of the deal were  
11 I get a -- they get a release for all of this, free pass, and  
12 Mr. Bodner won't take out his money, the 40 million of the LP  
13 interests that were mismarked, and he doesn't have his shares  
14 in the management company. Mr. Nordlicht is sending e-mails  
15 saying management company is worthless, worth zero. And nobody  
16 could take out any money. They had already decided that it was  
17 also impossible. There was a hundred million dollars of  
18 redeemers ahead of them and you know that includes Marcos Katz  
19 or it doesn't. (inaudible) nothing. But the important thing,  
20 the dispositive thing, it ends the conversation, is that if  
21 Platinum Management engaged in overvaluation or Mark Nordlicht,  
22 engaged in overvaluation, this release is out.

23 The box. . .

24 One more thing. I will come back to that.

25 They are trying to contend that the last four, five,

Mcf2Pla2

Summation - Mr. Gluck

1 six million of management fees were never paid. They were.  
2 It's in the record. It's in the bank records. Trott testified  
3 to it. Mr. Bodner's report ended at March 31, 2016 purposely  
4 with a straight line. That's why Mr. Trott got up there, you  
5 recall, very short testimony. Just not true.

6 This is what the form you are going to get looks like:

7 Is he a fiduciary? If the answer is no, not liable.  
8 If the answer is yes, not passive, liable.

9 If he knew about the overvaluation at any point and  
10 didn't disclose it, that's liability.

11 The second thing is about the release. Platinum  
12 Management or Nordlicht overvalued this fund, does not bar  
13 liability.

14 And then an overall amount of damages in number three.

15 And then of that amount, if any, you decide how much  
16 were incentive fees for 2012.

17 A special instruction you are going to get is that if  
18 you find that any one of these points, any one of these points,  
19 including the trip to Mexico to Mr. Katz in 2016, there was an  
20 implicit or express understanding between Nordlicht, Bodner,  
21 Huberfeld to overvalue (inaudible) valuation, then you begin  
22 2012 damages. Simple. You don't have to decide when he knew  
23 and when he didn't disclose. If you don't, if you don't find a  
24 conspiracy, then the question of when is relevant.

25 So 30 million incentive fees paid in cash. 5 million

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Summation - Mr. Gluck

1 paid to Bodner personally. Mr. Quintero on the basis of just  
2 six assets and no debt issues is at least 15 million, point  
3 five, unearned management fees paid. Total amount 46 million  
4 after January 1 of 2013.

5 Those are all possibilities. And in addition, one  
6 small issue. If it seems like Mr. Trott was aware of BDO,  
7 auditor, he was. Part of his job was to investigate all this.  
8 And you are not allowed to award attorney's fees for this case,  
9 but Mr. Trott testified about certain attorney's fees that  
10 PPVA -- not me, I don't do that stuff, but a different lawyer  
11 incurred suing BDO auditors, about \$4 million.

12 In summary, thank you for 12 days. It is appreciated  
13 and required in this sort of circumstance.

14 Secondly, we ask that you find Mr. Bodner was not a  
15 passive investor but, rather, a fiduciary, one who manifested,  
16 one who presented himself as a principal, somebody who could be  
17 trusted and relied on, the reason for the investment,  
18 oversight. We ask that you find that he is aware there was an  
19 overvaluation, undisputed he didn't disclose it because he is  
20 denying (inaudible). We ask that you find that he entered into  
21 a conspiracy at any point with Mr. Nordlicht, Mr. Huberfeld on  
22 this overvaluation, concealed it, and we ask that you find  
23 Mr. Nordlicht or Platinum Management engaged in an  
24 overvaluation in which case this release is invalid.

25 We ask that you calculate, based on every piece of

Mcf2Pla2

1 evidence that you have heard, the overall damages here to the  
2 very best of your ability that were proximately caused by the  
3 overvaluation by Mr. Bodner, or if he entered into a conspiracy  
4 even before, back to 2012, not forever, back to 2012, and then  
5 we ask that if any portion of those damages are for 2012  
6 incentive fees, you write that down and how much.

7 Thank you very much.

8 THE COURT: Thank you very much. Ladies and  
9 gentlemen, we will give you a 15-minute break at this time.

10 (Continued on next page)

Mcf2Pla2

(Jury not present)

THE COURT: Please be seated.

All right. Several housekeeping items.

First, let my law clerk hand to counsel the final instructions to the jury and the final verdict form. This is essentially what was signed off yesterday. I caught one or two typos, which amazingly had not been caught by Ms. Shen, but I corrected those typos, and the only thing that was even not a typo change was on page 15 in connection with the third element of the breach of fiduciary duty. And the second line of that, between the words "he" and "breached" I inserted the word "knowingly." that was consistent with the rulings I had made yesterday, but I think it had been inserted.

Second, let me return to Mr. Lauer his copy of the *Daubert* opinion that he kindly handed up, or maybe it was plaintiffs' copy. Okay, whoever's copy it was. I don't want to be accused of theft.

Third, just out of curiosity, because I do in my instructions refer to the three types of evidence as testimony, exhibits, and any stipulations, were there any stipulations?

MS. SHEN: Your Honor, there were a handful of --

THE COURT: All right, then I don't need to change that if it's right. Okay.

And finally, plaintiffs' counsel in his summation twice said that I would be giving the jury instructions with

Mcf2Pla2

1 respect to inferences that could or could not be drawn from  
2 Mr. Nordlicht's invocation of the Fifth.

3 Now, in none of the charging conferences—and we had  
4 about three—did anyone ask for that. I gave them an  
5 instruction at the time. So maybe what I should just say to  
6 them when they come back is you will recall I gave you the  
7 instruction on that at the time and if you have any further  
8 question about, that you can always send us a note.

9 MR. GLUCK: That's my mistake. I should have used the  
10 past tense.

11 THE COURT: Okay. Anything else, counsel wants to  
12 raise?

13 MS. SHEN: Yes, your Honor the parties have one  
14 question about two of the exhibits, PX 924 and PX 925, the two  
15 summary exhibits laying out the incentive fees and the  
16 management fees. We understand that they were not received in  
17 evidence and the parties are all in agreement on that, but your  
18 Honor had indicated that they might be helpful visual aids for  
19 the jury to consider.

20 THE COURT: Yes. So my normal practice, unless there  
21 is any objection, is to send any visual aids to the jury but  
22 marking them separately in the index, and I will tell the jury  
23 that those are being submitted for whatever help they may have  
24 as an aid to your memory, but they are not intended to be  
25 themselves evidence. So I am happy to do that.



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1 Any objection to that?

2 MR. HERTZBERG: Well, no objection to the visual aid,  
3 but we would ask that the PX stamp be removed so the jury  
4 doesn't confuse the visual aid as evidence. In the closing it  
5 was shown with the PX 924 and PX 925 stamp on it. I think  
6 that's --

7 (Continued on next page)

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MCFCpla3

1           THE COURT: That's the way the jury first saw it. I  
2 think it's actually helpful to you because that shows that this  
3 is the plaintiffs' assertion, not the defendant's. So, what  
4 you should do is add them to the index, I want to see the index  
5 before I instruct the jury after lunch, but it should have  
6 these as a final separate thing and I'll just explain to them  
7 this is not being submitted as evidence, et cetera.

8           MR. LAUER: Your Honor, I apologize. We didn't  
9 communicate on this because your Honor raised it for the first  
10 time. I would object to the jury getting any chart that was  
11 not a traditional summary and put in evidence. That's  
12 basically the evidentiary rule. We did not have the  
13 opportunity to examine these charts in that context. I  
14 always --

15           THE COURT: That's a good argument, and I may agree  
16 with it, but I will note for the record, my recollection is  
17 that the first summary chart was offered by plaintiffs as an  
18 exhibit in evidence, was not objected to on any ground at that  
19 time by defense counsel.

20           So if we were really being hyper technical, what we  
21 would do is allow that first chart in as evidence and not the  
22 others. But I don't think that's a sensible way to proceed  
23 because the sensible thing is to tell the jury this is not  
24 evidence, it's just there for a helpful summary.

25           Yes, go ahead.

MCFCpla3

1 MR. AMENT-STONE: Your Honor, I hate to take the  
2 Court's time. Just for a clear record, on page the 66 of the  
3 transcript is where this exhibit, Plaintiffs' Exhibit 924, was  
4 first raised. It was not actually offered, but Mr. Lauer  
5 objected, the objection was overruled, but it was not offered  
6 or received. Later, the Court had an exchange with plaintiffs'  
7 counsel where plaintiffs' counsel represented --

8 THE COURT: That's as to one, but I thought there was  
9 an earlier one.

10 MR. AMENT-STONE: Not that I've seen, your Honor.  
11 Based on what I saw in the transcript, it was not received or  
12 even offered, and it was not consented to.

13 THE COURT: If what I just thought I remembered, and I  
14 always tell my wife that my memory is perfect and then my nose  
15 grows a little, if my memory was wrong, we will not submit it,  
16 but if my memory is right, we will submit it with the  
17 instruction that I just indicated.

18 So that will give you something else to look for for  
19 both sides, but I, for what it's worth at the moment, it seems  
20 to me that one of these exhibits, they didn't come in  
21 necessarily in numerical order, but one of these exhibits I  
22 think was received and then, later on, there were objections  
23 and so forth, and that were not received, but let's find out  
24 what the record is.

25 I'm sure defense counsel wants a few minutes before he

MCFCpla3

Summation - Mr. Lauer

1 starts, so let's talk a five-minute break.

2 (Recess)

3 THE COURT: Please be seated. My law clerk is  
4 checking, as well, but his initial take is that my memory was  
5 correct. Although, of course his testimony is biased in my  
6 favor, but we'll see what he has to say.

7 Let's bring in the jury.

8 (Jury Present)

9 We'll now hear from defense counsel.

10 MR. LAUER: Good morning. You've been a great jury,  
11 attentive, quite patient when addressed so many documents, so  
12 many conversations, so many emails, so many technical materials  
13 on oil and gas development, oil and gas valuations, the PPVA  
14 assets, the PPVA fees, and all the multiple interactions  
15 between and among the very interesting managers from Platinum  
16 Management.

17 I have to take my time this morning. This case is a  
18 serious one. It has the ability to affect the very life not  
19 only of David Bodner, but his wife, his children, his  
20 grandchildren, and I know you take this seriously, and bear  
21 with me when we go through the evidence in the case and what is  
22 not evidence.

23 You may find that much of the evidence that came in  
24 from the plaintiffs' side was actually plaintiffs' counsel  
25 speaking, and then ask yourself when you evaluate the issues in

MCFCpla3

Summation - Mr. Lauer

1 the case, did the testimony come from a credible witness or was  
2 it argument of counsel.

3 When you consider the evidence in the case, the key  
4 issue or the preliminary key issue is whether David Bodner, who  
5 the Court will instruct you, whether David Bodner exercised  
6 significant control over PPVA's management and its investments  
7 or agreed with Platinum Management or others at PPVA to carry  
8 out and be responsible for a particular role in the business or  
9 undertake a particular duty on behalf of PPVA. And there is no  
10 evidence in this case that David Bodner agreed at any time to  
11 take responsibility for a particular job at PPVA.

12 Now, a passive investor is simply a legal term.  
13 Mr. Bodner was a limited partner investor, but fundamentally,  
14 Mr. Bodner was an owner. He had founded this fund with Murray  
15 Huberfeld, with Mark Nordlicht. He had his family wallet in  
16 this fund. You may find that an owner has every right and  
17 every expectation to spend time in the business talking with  
18 the people who are working there, meeting with them, doing all  
19 these things. So the dichotomy, so to speak, is not is he a  
20 passive investor, no, he's an owner, but he made it very clear  
21 to Mark Nordlicht, to Murray Huberfeld and to everyone, I'm  
22 moving on with my life, I'm putting the money in, I'll help  
23 seed this fund, but I want no responsibility, I want no  
24 particular duties.

25 There's also no evidence in this case that David

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Summation - Mr. Lauer

1 Bodner exercised significant control with respect to Platinum  
2 Management, with respect to PPVA, or controlling Mark Nordlicht  
3 or anyone else. That's the primary issue that you must first  
4 address, is he a fiduciary, did he undertake a particular job  
5 that was his responsibility or was he an owner, what's going  
6 on, tell me, give me a briefing. Did he have control or was he  
7 simply an owner of gathering information, expressing views,  
8 meeting with people.

9 Second issue, and I hope you never have to get there  
10 because on the first issue, your deliberations can end. David  
11 Bodner was an owner, a founder, a guy who had moved on and said  
12 I'm not taking any managerial role in this business. But the  
13 second issue is knowledge. I submit to you, most respectfully,  
14 there is no evidence that David Bodner at any point in time  
15 came to have actual knowledge that the assets of PPVA, in  
16 particular these six assets, these larger ones were these  
17 complex oil and gas development companies, no actual knowledge.  
18 In fact, you will find he had no suspicion that Mark Nordlicht  
19 or anyone at Platinum Management was intentionally inflating  
20 these assets.

21 You may find that not much has changed since I  
22 addressed you on November 30 in my opening. I told you then  
23 that the claim that David Bodner controlled Platinum Management  
24 was empty clothes, it was just spin. And plaintiffs claim that  
25 David had actual knowledge that PPVA assets were intentionally

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Summation - Mr. Lauer

1 inflated was more spin. I said this is a case of emperor's  
2 clothes because David did not control Platinum, Mark Nordlicht  
3 controlled Platinum. He was the sole manager of Platinum and  
4 PPVA, and responsible for everything that happened at the fund.

5 David, through his family company, was a beneficiary  
6 of the trust. He received fees profounding it with basically  
7 the wealth that he had acquired prior to the fund being  
8 started, but when the fund was created in 2003, David Bodner  
9 made it very clear to Mark Nordlicht and Murray Huberfeld, you  
10 guys can run the fund, I don't want any part of it. I am not  
11 going to manage a hedge fund. You may find, therefore, that  
12 David Bodner was not a fiduciary, and that will end the case.

13 The evidence clearly shows David had no detailed  
14 information on these complex assets. He relied on Nordlicht,  
15 Ari Glass, Uri Landesman, SanFilippo, the other executives at  
16 Platinum to manage the fund. He lacked the information to be  
17 able to confirm or contradict the high-level remarks at partner  
18 meetings discussing these assets. You've seen some of these  
19 valuation reports, a PV-10, these are complex documents and  
20 understanding exactly how you value an oil and gas development  
21 company does not come naturally.

22 There were dozens of people working at Platinum during  
23 the relevant time. Many of them were subject to potential  
24 subpoena to come into this court. Several of them testified,  
25 dozens of emails were introduced, and I submit to you, you will

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Summation - Mr. Lauer

1 not find in any of the evidence that David Bodner, one,  
2 exercised managerial control with respect to PPVA's investments  
3 or that anyone testified that David Bodner agreed to take  
4 specific responsibility over a particular job at PPVA.

5 I will try to summarize the evidence on each of the  
6 key points. David Bodner had no legal control of Platinum  
7 Management or PPVA, he had no practical control over Platinum  
8 Management, no managerial control, and did not accept any  
9 particular duty or role within or on behalf of PPVA. He  
10 clearly had no role in creating or reviewing the net asset  
11 value statements and never had actual knowledge that any of  
12 these valuations or statements were intentionally overvalued.  
13 I think you will find that, at all times, David Bodner acted in  
14 good faith, took no steps, had no omissions, and did nothing to  
15 harm PPVA.

16 Now, by early 2014, David and the others accepted Mark  
17 Nordlicht's advice that the partners should not take out  
18 incentive fees while the fund was experiencing liquidity  
19 problems. So for the last two years of the fund, while  
20 supposedly David Bodner knows that the assets are inflated and  
21 supposedly knows that the rest of the world does not know that  
22 they're inflated, does he talk his money out, does he take some  
23 of his money out? No. They basically pass a rule, none of the  
24 partner families can take their money out until all the outside  
25 investors get their money out, and since there was no liquidity



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Summation - Mr. Lauer

1 for that, they basically were agreeing to keep their money in  
2 the fund, and they agreed, beginning in the middle of 2014,  
3 that the partners would not take any of the incentive fees out.  
4 And that's why, while the incentive fees that were calculated  
5 on the basis of the net asset value was 55 or \$60 million, the  
6 actual amount of incentive fees that were paid over this period  
7 was \$30 million, because starting in 2014, in fact the very  
8 last incentive fee payment was to Mark Nordlicht in June of  
9 2014. David Bodner's last withdrawal of incentive fees was  
10 February of 2014, more than two years before the fund went into  
11 liquidation. Ask yourself if that is the conduct of a man that  
12 supposedly knows that the money is not there.

13 Let me now turn to the instructions that you will  
14 receive from the Court shortly after lunch.

15 The first question the Court will ask you is to  
16 address whether David Bodner is a fiduciary. You will have the  
17 instructions, but I'm going to read from them right now.

18 First, David could be a fiduciary if one party – that  
19 is someone at PPVA – with David's knowledge and consent  
20 reasonably put its trust and confidence in David to carry out a  
21 particular role or undertake a particular duty on behalf of  
22 PPVA.

23 Now, my colleague talked about people trusting David.  
24 You may find there's a fundamental difference between being  
25 recognized as a scholar, a charitable individual, an individual

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Summation - Mr. Lauer

1 who helps people and has the general trust of other people on  
2 the one hand and trust within the meaning of the fiduciary  
3 charge that PPVA is relying specifically on David to do  
4 something, relying on him to supervise a particular area of the  
5 fund. Therefore, people had trust in David, investors who knew  
6 David, but were solicited by Huberfeld or Fuchs from the same  
7 community. They liked David and they thought he was a good  
8 guy, but he didn't solicit them, he didn't bring them in, and  
9 no one has testified that they relied on David Bodner to  
10 monitor or to do anything for them within the fund.

11 I believe you will find there is absolutely no  
12 evidence that anyone associated with PPVA or Platinum  
13 reasonably assumed that David Bodner was assuming  
14 responsibility to carry out a role or to undertake a particular  
15 duty on behalf of PPVA.

16 The second way David could be a fiduciary is if he  
17 exercised significant control, and there's no evidence of that.

18 Now let's go through the evidence that plaintiff  
19 offers on these points. Their whole case seemingly rests on  
20 the fact that David Bodner came to this office, that he  
21 attended meetings, he talked to people, that a number of these  
22 meetings involved the portfolio managers at PPVA are included  
23 investors of PPVA. Obviously, many of these meetings, as you  
24 saw when Mr. Bodner was shown 40 or so emails, many of these  
25 emails had nothing to do with the business of PPVA. They

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Summation - Mr. Lauer

1 involved personal meetings, personal investments, charity work,  
2 working with kids at risk, but there clearly were meetings  
3 involving PPVA, but none of that evidence is control and none  
4 of that evidence is taking responsibility for a particular job.

5           You've heard both from Mr. Bodner himself and from  
6 Mr. Huberfeld that when they started the fund. David Bodner  
7 affirmatively said, so there was no mistaking it, I'm putting  
8 my money in, I don't want to manage a hedge fund. This is what  
9 Mr. Bodner testified to under oath. Did you affirmatively tell  
10 Mr. Nordlicht that you did not want to have responsibility of  
11 the fund? I did. Did you tell Huberfeld affirmatively that  
12 you did not want to have any responsibility at the fund? I  
13 did. Did they accept that? Yes, they did. Did you have any  
14 control over the fund? I had no control whatsoever. Did you  
15 have any control over Platinum Management? No, I did not.

16           You heard evidence about the physical office structure  
17 over, and over, and over again, 54th floor, 4th floor. At the  
18 end of the day, as Mr. Bodner testified, that office suite on  
19 the 54th floor was the original offices that, in 1996, Bodner  
20 and Huberfeld had taken. When Mark came in because the lease  
21 payments were well below market, they said Mark, you can run  
22 Platinum from this floor, we'll keep our office and we'll have  
23 access to the adjacent conference room. Mark came in, put up a  
24 glass wall to separate Platinum Management from the office that  
25 Bodner and Huberfeld shared.

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Summation - Mr. Lauer

1           During the trial, plaintiff showed David dozens and  
2 dozens of emails, and you were shown a number of emails where  
3 Mark Nordlicht asks David at various points in time, please go  
4 out and talk to these wealthy businessmen that you're socially  
5 friendly with, please go out, ask Englander, ask Schroen, ask  
6 them to help, ask them to put money into the fund, ask them to  
7 invest. There is no evidence in this record that David ever  
8 went out and solicited any of those people.

9           You have seen emails, particularly with respect to the  
10 Black Elk fund and other items, here's a list that David should  
11 call, and there is no evidence that David called any of those  
12 people, and those people all live in the New York area. If it  
13 was important to plaintiff to show that David Bodner actually  
14 solicited any of these investors to make that point, they could  
15 have subpoenaed any one of the number of people, a number of  
16 whom were deposed in this litigation. They didn't do that  
17 because not a single person has testified that David Bodner  
18 solicited them.

19           Now, David Bodner knew a lot of these investors, and  
20 that's because, as I said earlier, it's one community. Murray  
21 Huberfeld solicited them, Bernie Fuchs said I will raise  
22 \$125 million, make me a partner, he solicited them, but David  
23 Bodner did not solicit investors.

24           You may find attending a partners meeting every three  
25 months or that, on occasion, David Bodner, through his

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Summation - Mr. Lauer

1 secretary, would ask Mark Nordlicht's secretary or Uri  
2 Landesman, can we set up a partners meeting. You may find that  
3 the plaintiffs have turned this on its head. David Bodner is  
4 saying "hey, I'd like to have a meeting so I can get briefed on  
5 what's going on" is not a sign of someone who's running the  
6 place, it's the sign of a guy who's got \$40 million invested,  
7 is a participant in the management company to receive the fees  
8 and he wants to get briefed. Mark Nordlicht doesn't need to  
9 have partner meetings other than to raise money, to deal with  
10 his liquidity problem. David Bodner attends partners meetings  
11 when he can to find out what's going on. Nothing about these  
12 partner meetings demonstrates either going into the meeting or  
13 coming out of the meeting that David Bodner undertook a  
14 specific role, I'm going to do this job, I'm going to supervise  
15 that portfolio manager, I will work with these consultants. I  
16 mean, you all have jobs, you all live in the real world. If  
17 you're running a business, you have people asking you for  
18 approval on this, approval on that. The only thing they could  
19 come up with is when they wanted to brief Bernie Fuchs on the  
20 Black Elk situation, Uri Landesman says to David, who do you  
21 think would be the best one to brief Bernie who wasn't then a  
22 partner. That doesn't represent, oh, Mr. Bodner, please let me  
23 know that I can brief Bernie Fuchs. He's asking for his  
24 advice. They're colleagues.

25 So, in short, I've probably taken more time on this

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Summation - Mr. Lauer

1 issue than necessary. The meetings prove nothing, the calendar  
2 invites prove nothing. They simply show a man who's an owner  
3 of a business, a person who's involved in charity, a person  
4 who's involved in all sorts of endeavors living a life, but no  
5 one showed you any emails, any documents, any testimony that  
6 reflected either control or, yes, I now assume responsibility  
7 for this.

8 My colleague made a point of saying they called  
9 Mr. Huberfeld, we didn't. You may find that the Court has a  
10 rule that a witness can only be called once in this case. They  
11 go first, they put Mr. Huberfeld on the list, and the deal was  
12 we had to examine on their case. So I'm not sure why that  
13 point was made, but you should understand that nothing about  
14 the order of witnesses reflects anything other than the  
15 plaintiffs go first.

16 Control is so important here because if you find no  
17 control and no specific undertaking of duty, your deliberations  
18 end, you're done. So I'm going to spend a little time on  
19 control.

20 First, what we'll call legal or contractual controls.  
21 Did David Bodner, in fact, have significant control, real  
22 authority within Platinum Management or did he not.

23 So let's look at DX 159.

24 Notwithstanding anything herein to the contrary, the  
25 trustees, this is the Mark Nordlicht trust, shall both the

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Summation - Mr. Lauer

1 trust's membership interest and give or withhold the trust's  
2 consent to actions of the company as he determines in his sole  
3 and absolute discretion.

4 Let's go to section 3.2. Passive members.

5 No passive member shall have the right, authority, or  
6 power to act for or on behalf of the company.

7 Let's go to the Platinum Management operating  
8 agreement, DX 164.

9 The investment manager of the fund, the controlling  
10 principal of the investment manager is Mark Nordlicht as may be  
11 determined by the general partner in its sole discretion  
12 collectively.

13 The next one is DX 729, the private offering  
14 memorandum, which is what is given to every investor who  
15 subscribes to the fund. I don't know if you can see it, but  
16 this document is in evidence. The investment manager,  
17 Nordlicht, has sole discretion over investment decisions as  
18 controlling principal of the investment manager.

19 Finally on this point, DX 620.12. This is a Platinum  
20 document that was given to the auditors so the auditors can see  
21 who actually has authority to write checks in a business. Mark  
22 Nordlicht, Uri Landesman, Gilad Kalter, Naftali Manela, Daniel  
23 Mandelbaum, Joseph SanFilippo, Will Slota, Joshua Kramer,  
24 Michael Kimelman, Joseph Ritterman - no David Bodner. He's an  
25 owner of Platinum Management because he has no job or

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Summation - Mr. Lauer

1 responsibility within PPVA, he doesn't even have check-writing  
2 authority within the fund.

3 In sum, you may find, and I hope you do, David Bodner  
4 is not a fiduciary. In order to find him liable, in order to  
5 go on to discuss valuations and damages and all the other  
6 things, you first have to find that David Bodner was a  
7 fiduciary, and there's no escaping it. In order to find David  
8 Bodner liable, you have to find he had significant control over  
9 the management of PPVA's investments or that he agreed to carry  
10 out a particular role or undertook a particular duty on behalf  
11 of PPVA and its business. There's nothing here. It's really  
12 exactly like I said when I opened, emperor's new clothes, there  
13 is no evidence.

14 Let's talk about knowledge. If you find he was a  
15 fiduciary, you will then be asked to determine whether David  
16 had knowledge that the fund's assets were overvalued, and he  
17 breached his duty by failing to disclose that knowledge. And  
18 you have to find actual knowledge, not a suspicion, not a hint,  
19 you have to find that he actually knew that these assets were  
20 inflated intentionally.

21 I would submit to you there's no evidence. What  
22 evidence have they offered? They say on November 16, 2012,  
23 there was an explosion on the platform that Black Elk had on  
24 the Gulf, three people were killed, and there's testimony that  
25 that was quite an event, front page of the New York Times, it



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Summation - Mr. Lauer

1 was all hands on deck at Platinum. And then plaintiff offered  
2 PX 417, which reflects that somebody must have asked David to  
3 find out if the interest payments on the Black Elk fund were  
4 going to be paid. We know from the evidence that if, in fact,  
5 an investor friend called David up, he didn't solicit that  
6 person, but someone who knew David must have called him to ask,  
7 are the funds getting paid. While David didn't remember this  
8 particular email, nothing in this document evidences knowledge  
9 that PPVA's valuations for Black Elk were inflated. All it  
10 says is that an investor was concerned, and reasonably so, that  
11 there could be a significant impact on the company by virtue of  
12 the explosion and they called David. But there's no indication  
13 as to at what level did Black Elk -- at what valuation level  
14 had Platinum valued Black Elk, and there's no indication that  
15 David Bodner ever knew and there was no evidence of to what  
16 extent Platinum lowered its valuation for Black Elk after the  
17 explosion.

18 So, knowing that there's an explosion, knowing that it  
19 probably had some meaningful impact on the company really  
20 doesn't tell you anything about, A, what dollar amount was  
21 Platinum using to value it, to what extent did Platinum, in the  
22 six weeks between November 16 and December 31, fully absorb the  
23 financial impact, and to what extent were the revised  
24 December 31 valuations overinflated, and then, finally, the  
25 real point, there's no evidence in any way connecting David

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Summation - Mr. Lauer

1 Bodner to knowing what that dollar amount was.

2 And you will see in the valuation reports, Black Elk  
3 had 233 platforms. This was one platform out of 233. It's one  
4 platform, and the cause of the explosion was that the welders  
5 were working on the platform which had been shut down since  
6 August. No one wants to minimize the fact that three people  
7 were killed, but in evaluating the financial impact, while  
8 obviously meaningful and significant, there's no evidence that  
9 this one well out of -- this one platform out of 233, a company  
10 with 500,000 acres under lease, 500,000 acres, that's almost  
11 the size of Rhode Island, and 1100 wells in the Gulf of New  
12 Mexico, that somehow this company was now worthless. There's  
13 no evidence of that and the evidence is to the contrary.

14 While clearly in 2013, 2014, the prospects for this  
15 company significantly declined, but the erosion was gradual.  
16 And you will find in exhibit 23, Mr. Quintero's own, quote,  
17 overview, it shows that he, himself, said in his report, not  
18 what he said at trial, that the financial prospects for the  
19 company gradually declined. It was only after the Renaissance  
20 sale two years later in 2014 that Mr. Quintero, in his report,  
21 says he believes it became worthless in 2014.

22 But the issue in this case on the 18 and a half  
23 million dollars of incentive fees from 2012 was based on an  
24 unsupported statement that Black Elk lost significant value so  
25 that the incentive fees paid in December were inflated.

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Summation - Mr. Lauer

1           The next thing that plaintiff points to about  
2 Black Elk trying to show that David Bodner knew the assets were  
3 inflated is a year later in January of 2014, David Steinberg  
4 sent Angela Albanese a stock broker's report on Black Elk  
5 traded bonds. While David doesn't remember whether he got that  
6 or not, if you look at that document, and it's Exhibit PX 554,  
7 you will see that the broker says -- and this is in January of  
8 2014. The broker says the Black Elk bonds are trading in the  
9 80s, say 85, 86, 87, and in his view, the bonds are overvalued  
10 and he's recommending that the bonds be sold by those reading  
11 his report. He doesn't say this company is worthless, and he  
12 says nothing about a year and a half earlier, gee, this company  
13 became worthless. To the contrary, he's evaluating it, he's  
14 saying in the 80s, the bonds could be priced by the market  
15 above where they should be, and if you're holding these bonds,  
16 you ought to sell them. No panic. Nothing about significant  
17 loss of value.

18           The other thing that's interesting is he talks about  
19 the engineering report. One of the things that seems to be  
20 undisputed in this case is that no one has challenged the  
21 competency of these engineering reports, DeGolyer or the other  
22 one. And each of these engineering reports for Black Elk, for  
23 Golden Gate, for Northstar shows millions and millions and  
24 millions of oil in the ground or billions of cubic feet of  
25 natural gas that is in the ground. No one has -- they have not

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Summation - Mr. Lauer

1     disputed that, they ignore it. But no one has disputed that  
2     these companies had enormous wealth in the ground waiting to be  
3     extracted.

4             Another document that supposedly shows knowledge is  
5     PX 459. Let's pull up 459, please.

6             Pretty boring document, but this document is an email  
7     from Levy to Huberfeld, listing a company apparently with  
8     interest payments, and this was forwarded to Albanese by  
9     Huberfeld. Whether this went to David Bodner or not, who  
10    knows, but nothing in this document indicates knowledge of  
11    valuations, knowledge that the valuations were off.

12            Next document, PX 592. This one is from David  
13    Steinberg, and he says, if we don't have the extra money, we  
14    probably lose close to \$400 million of value due to unfunded  
15    positions.

16            Now, this document supposedly says that the author  
17    believes there's no value. You may find the exact opposite.  
18    He's saying if we don't get the funding, we're going to lose  
19    \$400 million of value in these illiquid companies that is  
20    trapped and needs to get free with liquidity. So this  
21    document, far from showing David Bodner has knowledge that the  
22    assets are inflated, shows that the assets are not inflated,  
23    but the value is trapped and needs liquidity.

24            Also, the email mentions gate. You may find, as David  
25    Bodner testified, gating is not going out of business. Gating

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Summation - Mr. Lauer

1 is dealing with liquidity issues. And in the fund documents,  
2 when there are too many people seeking withdrawal of funds and  
3 the funds don't have the money, you put up a gate, and you have  
4 a right to do that. And what you do is you put up the gate to  
5 manage the assets, everybody understands there are no  
6 withdrawals. The accrual of management fees is suspended and  
7 that's what happened in 2008, 2009. They put up a gate, there  
8 were no withdrawals, Nordlicht managed the assets in that  
9 manner and realized tremendous profit for the fund. This email  
10 is not saying we're going out of business, this email is saying  
11 we would have to put up a gate, side-pocket the illiquid  
12 investments and deal with it that way. Nobody wants to do that  
13 because you're basically -- you annoy your investors and there  
14 are a lot of other hedge funds people can invest in.

15 That brings me to the famous Bernie Fuchs dinner,  
16 because you may find until this dinner, there's absolutely  
17 nothing in the case in which David Bodner is affirmatively  
18 addressing valuations. There are no emails, no documents,  
19 nothing. So Mr. Fuchs thought the dinner occurred sometime  
20 between December of 2014 and March of 2015. Mr. Bodner also  
21 couldn't definitively place it, but basically we'll assume it's  
22 around that time.

23 So at that meeting, Mark made his typical  
24 presentation, the 10 largest assets, here's where we stand,  
25 here's the money that we need, we're having these tremendous

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Summation - Mr. Lauer

1 liquidity issues, people want their money out. David Bodner  
2 says one way to stop encouraging people to take their money off  
3 the table or to take the profits off the table is not to  
4 realize in your valuations the profits you believe you have,  
5 but you haven't turned into cash. And Mark says, you don't  
6 know what you're talking about, I've got auditors, I've got  
7 valuers, I'm required, when I run a hedge fund, to value the  
8 fund every month and include in the valuation the anticipated  
9 profits. Obviously that involves a tremendous amount of  
10 judgment, but I've got to do that. And then he tells David,  
11 dismissively, this person who is supposedly his partner in  
12 crime, this person who supposedly has authority over him  
13 basically says you don't know what you're talking about, go  
14 back to Yeshiva, go back to Monsey, you do not know how to run  
15 a hedge fund.

16 No one at that dinner meeting says that this  
17 conversation involved or suggested that anyone at the dinner  
18 thought that Mark was intentionally overinflating the fund  
19 values. This was a discussion about how do you tamp it down a  
20 little bit so people don't take their money off the table. You  
21 may find that this dinner is significant in a number of  
22 respects. A, it shows that David was not in control, it shows  
23 that he was not in agreement with Mark to do anything because  
24 that clearly is not a way to talk to someone who's supposedly  
25 in agreement with you on inflating the assets to defraud the

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Summation - Mr. Lauer

1 PPVA fund. Nothing before that dinner, nothing after the  
2 dinner in any way suggests that David Bodner, Bernie Fuchs, or  
3 Mark Nordlicht, or Murray Huberfeld thought that Mark Nordlicht  
4 was intentionally overvaluing the assets. Consider that Bernie  
5 Fuchs attended the dinner, testified he believed Mark knew what  
6 he was talking about, and for a year and a half, he continued  
7 to solicit investors, his close friends to put money into the  
8 fund, never considered that the assets were inflated.

9 This is significant because over the next year and a  
10 half, there were multiple partner meetings, multiple meetings,  
11 and this issue never comes up again. And plaintiffs, despite  
12 having 17 million documents in their Platinum server, have not  
13 shown us a single document before or after this dinner which  
14 suggests that David Bodner knew or anyone knew that these  
15 assets were intentionally inflated.

16 Now, also at the time of this dinner, and I think this  
17 is clearly an important element to all of this, because you're  
18 being asked to decide that David Bodner intentionally  
19 participated in a scheme or a conspiracy, if you will, to  
20 defraud the fund.

21 Now, as of December 2014 or early 2015, the partners  
22 had already agreed and Mark had made the decision, no family is  
23 taking money out, no incentive fees are being paid, and that's  
24 why the focus on incentive fees is the performance in '12 and  
25 '13. '14, '15, and '16 have no bearing on the incentive fee

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Summation - Mr. Lauer

1 payments.

2 I think no matter what you may think of Mark  
3 Nordlicht's approach to running a hedge fund, there simply is  
4 no evidence in this case that David Bodner had actual knowledge  
5 that Mark Nordlicht or anyone working for him at Platinum was  
6 intentionally inflating the asset values. And unless you find  
7 actual knowledge, actual knowledge that you know this, that you  
8 could swear to it, unless you find actual knowledge, you have  
9 to find for David Bodner because his liability, he can only be  
10 liable if he's a fiduciary and you find that he came to have  
11 actual knowledge that Mark Nordlicht was inflating the assets.

12 I want to talk a little bit about the release. This  
13 is complicated, a lot of legal points that the lawyers and the  
14 Court deal with that don't always make it into evidence. But  
15 the next instruction that the Court will give you is on the  
16 release agreement, and pursuant to the Court's instructions,  
17 you must find that the release is enforceable, it's written,  
18 it's signed, it has consideration, and it bars plaintiffs'  
19 claims. And then there is the exception, unless you find that  
20 David and Mark Nordlicht both engaged in misconduct and they  
21 both engaged in the same misconduct. You've seen the release  
22 at this trial, it's JX 74.

23 I think we should show JX 74.

24 And the background to the release is not in dispute.  
25 There were significant liquidity issues. Platinum was



MCFCpla3

Summation - Mr. Lauer

1 experiencing a critical liquidity problem. And at first, Mark  
2 Nordlicht asks David and Murray Huberfeld to put in their own  
3 personal money, David refused. He asked them to go out and  
4 solicit investors to put in money, David refused. Finally,  
5 Mark Nordlicht said, well, if you're not going to work with me,  
6 give me your shares so I can go to Katz and Hannah and other  
7 wealthy people and bring them in and save the fund. And David  
8 and Murray Huberfeld effectively said, we each have about  
9 \$40 million, the majority of our family money in this fund. If  
10 we don't give up the shares, he won't be able to entice people  
11 like Katz or Hannah or others to invest. So I'll give up my  
12 shares, hopefully he can get the money, hopefully he can save  
13 the fund.

14 So they have a release agreement. Now, this agreement  
15 is not simply a release, it's an agreement by which David  
16 Bodner, Murray Huberfeld give up their shares. They agree to a  
17 lockup of two years, in other words for at least two years to  
18 help with the liquidity at the fund, \$80 million will not be  
19 taken out. They agree that because Uri Landesman was retiring  
20 and also leaving the fund, that the first \$6 million that comes  
21 out goes to Uri. And basically, when you look at JX 74,  
22 there's nothing funny about it, it's a straightforward release  
23 agreement. The only thing that's a little bit interesting is  
24 Marcos Katz, who's not a party to this agreement, but was going  
25 to be an investor and put new money in and basically would

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Summation - Mr. Lauer

1 become one of the owners of Platinum Management and would be  
2 responsible for the success of PPVA. He is listed as what we  
3 call a third-party beneficiary. There's not a party to the  
4 agreement because it was a release between Platinum and  
5 Huberfeld and Bodner, but he negotiated through his counsel to  
6 have the right to enforce the agreement, to enforce the lockup  
7 agreement.

8 (Continued on next page)

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Mcf2Pla4

Summation - Mr. Lauer

1 MR. LAUER: So what you see is this was an agreement  
2 involving Platinum, involving Huberfeld and Bodner and  
3 Landesman and Fuchs, but also the third-party beneficiary, the  
4 Katz family.

5 The Court will instruct you that the agreement is a  
6 valid agreement and Mr. Bodner would have no liability under  
7 this agreement unless you find this exception. And that  
8 exception is that you find (a) Bodner was a fiduciary, came to  
9 have actual knowledge and breached his fiduciary duties and (b)  
10 Nordlicht is also a -- or Platinum Management also breached  
11 their duties, also knew that the valuations were intentionally  
12 inflated, and committed the same misconduct as Bodner. If you  
13 don't find that, then you have to find that the release is  
14 valid.

15 Now, you may find—and you are free to try to find  
16 it—you may find that there is no evidence in this case, and  
17 you will get all the exhibits and you could ask for testimony  
18 if you want it, but there is no evidence in this case that  
19 Bodner had any agreement with Mark Nordlicht or anyone else to  
20 do anything improper, certainly no agreement to engage in a  
21 scheme or a plan or a conspiracy to inflate the assets of PPVA  
22 to injure the fund and its investors. There is no evidence  
23 that David Bodner conspired with anyone.

24 Let me talk a little bit about valuation.

25 Mr. Quintero was their valuation guy. Mr. Quintero

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Summation - Mr. Lauer

1 came in and he had done this elaborate report, it was 500  
2 pages, and basically you may find that he came into court and  
3 he completely contradicted everything in his report. He just  
4 made it up on the witness stand.

5 Before I take you through the damages, I would like to  
6 take some time to walk you through some of these valuation  
7 reports by Sterling, by Alvarez, the audit reports by  
8 CohnReznick, by Bodner, the valuation evidence within those  
9 reports. Because while Quintero did not do a valuation, he is  
10 supposedly an expert, he knows how to do valuations, but he  
11 chose never to do a valuation of any of these assets. He could  
12 have valued Black Elk as of December 31, 2012, he could have  
13 valued Golden Gate as of December 31, 2013, he did do  
14 valuation.

15 He came in and he said I'm going to pick two numbers,  
16 a starting number, a bottom number, I'm going to draw a line  
17 and then I'm going to compare my line with Platinum's numbers.  
18 It's completely arbitrary. It's completely made up. And you  
19 may find you can ignore everything he said because what he  
20 should have done was come in with a valuation report to explain  
21 here are the reserves, here is what I see, here all the bad  
22 evidence that's in this case about this company, and let me  
23 show you how it interacts with 18 million barrels of oil in  
24 California. But he didn't do that. But it's incumbent on us  
25 to show you the people who did do valuations. These were

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Summation - Mr. Lauer

1 professionals. Every three months either Sterling or Alvarez  
2 did a valuation report and it's complex, but they are  
3 professionals and they did it, and let's start.

4 Start with 2012. The only two assets that were owned  
5 by Platinum were Black Elk and Golden Gate. I'm sorry. I  
6 misspoke. We are going to start with Quintero's report because  
7 you are going to see what's in his report which is completely  
8 contradicted by his trial testimony. So I'm sorry.

9 Let's start with Quintero report, Exhibit 23.2. What  
10 Quintero did is he took a number which was the value that  
11 Platinum used for Black Elk December 31, 2012, put up there, he  
12 took another dot which is after the Renaissance sale in 2014,  
13 and he drew that line.

14 So he starts with Black Elk's fair value, I want to  
15 show this, as of December 31, 2012, and this is Exhibit 23.2  
16 and it is in evidence as Defendant's Exhibit 765. This is an  
17 important exhibit because it shows what Quintero put in his  
18 report that was subject to cross-examination before trial.

19 So he says as reported this is worth 284,006,000 as  
20 adjusted. This is Platinum. This is his number. He is saying  
21 based on the way I am doing my valuation, my straight line  
22 valuation, the adjusted is the same, 284,006,000.

23 And then he says reported over adjusted? Zero.  
24 Meaning he submitted this report, testified under oath that in  
25 year ended December 31, 2012, the amount of inflation was zero.

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Summation - Mr. Lauer

1 And this is an arithmetic error because the next month shows  
2 January 2013. December was zero and then he shows that in  
3 January, Platinum has it valued at 271 million. And Quintero  
4 says I believe the number on my sliding scale is 257 million,  
5 and therefore there is a 36 million inflation.

6 So for 2013, Quintero is saying in January there is  
7 inflation. For 2012 -- and the reason we are emphasizing this  
8 and the reason the Court asks to you identify '12 versus '13 is  
9 18 1/2 million of the 30 million in incentive fees that they  
10 are claiming are based on 2012 and, according to Quintero, in  
11 his report, you see there was no inflation in 2012.

12 Let's go to 23.1. So you see this is not a mistake.  
13 23.1, which you will have, it's part of 765, again shows zero  
14 total damages for inflated fees as of December 2012. That is  
15 the top line here. That's December 2012, zero across the  
16 board.

17 As long as we are doing this, let's take a look at  
18 Golden Gate, which was the other 2012 asset. This is 24.1.  
19 It's part of Exhibit DX 765. Here again, doing it backwards,  
20 here again, December 12, excessive reported overadjusted zero.  
21 Damages from inflated management fees, zero. Damages from  
22 inflated incentive fees December 2012, zero. Total damages  
23 from inflated fees, zero.

24 Let's go to 24.2. This is the companion document in  
25 Quintero's report, and it shows that in December of 2012 the

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Summation - Mr. Lauer

1 reported valuation is 49,440,000. The adjusted, that's his  
2 straight line number, 49,440,000, the amount of inflation or  
3 reported overadjusted, zero.

4 Now, what does he do? He comes into trial and he  
5 says: Well, forget my report. I express my, quote,  
6 professional opinion that once that explosion occurred on that  
7 platform, this multimillion dollar company was worthless. Now,  
8 if that were his true belief or if he were being responsible  
9 here, if that's what you believe, then do a valuation as of  
10 December 31, 2012 that can be cross-examined and we can  
11 evaluate whether in fact that opinion makes any sense. But all  
12 he did is testified on the stand, boom.

13 Now, you may find when you look at another exhibit  
14 from his schedule, and that is Exhibit 23, which is called an  
15 overview, and the plaintiffs put this in, and I thank them for  
16 that, the only time in his report that he says in this overview  
17 that Black Elk became worthless is after the Renaissance sale  
18 when 150 million of assets were sold, there was very little  
19 left to Black Elk, and that is in June, July, and August of  
20 2014. And you may find when you look at his overview, you will  
21 see that he basically stood -- he sat in the witness chair and  
22 used the phrasing from 2014 and said, ah-ha, that's my opinion  
23 that as of the explosion this company was worthless. And you  
24 will see in that overview that he gives, he has different facts  
25 that occurred in November and December of 2012. You will see

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Summation - Mr. Lauer

1 here "unequivocally worthless after Renaissance sale August  
2 14."

3 And when you go back up front to the 2012 section, you  
4 will see a completely different phrase. "Black Elk  
5 demonstrated signs of financial" -- "Black Elk" -- what  
6 happened to it?

7 (Pause).

8 MR. LAUER: This is what we were looking for. This is  
9 in chart 23, overview. "Black Elk demonstrated signs of  
10 financial deterioration during 2013 that accelerated during the  
11 first three quarters of 2014."

12 And when you look at that overview, what you are going  
13 to see is a complete contradiction of what he testified to at  
14 trial.

15 So there are two contradictions with Quintero. (A) he  
16 puts in this elaborate report, does his schedules for each of  
17 the six assets and for the two in 2012 he says what's the  
18 amount of inflation? Zero. Right? Doesn't do a valuation  
19 report. Then he comes in to trial and he says the moment the  
20 explosion occurred, the company was worthless. Then when you  
21 look at the overview, that's not what he said. He said there  
22 was gradual deterioration and it only became worthless on the  
23 next page in his overview after the Renaissance sale. You may  
24 find the Court is going to instruct you on special witnesses,  
25 and two experts are special witnesses, and I will address this



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Summation - Mr. Lauer

1 more in a few moments, but you may find, if you conclude that  
2 Mr. Quintero was not straight with you, not a mistake, but he  
3 knowingly, he knowingly was not straight, that he had in his  
4 report 2012 was zero, comes to trial and they need to get  
5 another 18 1/2 million to really zing Mr. Bodner, so he says on  
6 the witness stand, oh, right after -- I don't have it in my  
7 report, but 18 1/2 million in incentive fee damages because  
8 this was worthless. And even that is not in his report. You  
9 can disregard his entire testimony if you find that he was not  
10 straight with you.

11 Now I am going to show you Exhibit DX 558. Bear with  
12 me. Some of this is repetitive. But we want to show you a  
13 number of the valuation reports so you can see the reserves,  
14 you can see, some of you may even enjoy looking at the PV10  
15 analysis.

16 So let's go to DX 558, page 4. This is going to be,  
17 when it shows up, the first quarter of 2013, which is just a  
18 few months after the November explosion.

19 Okay. This is the summary of Sterling's conclusion.  
20 Black Elk, Sterling low value 222 million. This is as of March  
21 31, 2013, four and a half months after the explosion. Sterling  
22 high value 290 million.

23 They also did Desert Hawk, 5.9 million to 26 million.  
24 This was a gold mine that was in development.

25 Golden Gate, low value 49 million, high value 55

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Summation - Mr. Lauer

1 million.

2 Let's go to the next document. DX 5621. This is the  
3 second quarter of 2013. So they did it three months, March 31,  
4 now it is six months. You realize a lot of this is dependent  
5 on the price of oil. What you are going to find, and this is  
6 in Mr. Quintero's report, oil hit \$100 at the end of 2013, so  
7 during '13, it is going up, company values are going up.  
8 Sterling low value 230 million for Black Elk, Sterling high  
9 value 260,500,000. Desert Hawk, 27 million, 27 million. So  
10 they basically find it around at the same number. Golden Gate,  
11 low value 61 million, high value 65 million.

12 The next document is DX 566. That's the third  
13 quarter. Black Elk 252 million is the low valve, 283 million  
14 is the high value. Desert Hawk 26 million and 26 million.  
15 Golden Gate low value 66 million, high value 71 million.

16 And finally for 2013, DX 601. And here you have 186  
17 million for Black Elk with the high value 195 million. Desert  
18 Hawk low value 22, high value is 26. Golden Gate 175, high  
19 value 197.

20 Now let's turn to DX 569, which is the audit opinion.  
21 And I am rushing through this because I have to finish in an  
22 allotted time, but please you will receive these reports and  
23 some of it is technical jargon that most of us wouldn't  
24 understand, but there is enough there in basic English, you  
25 will see what their reasoning was and why they are applying

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Summation - Mr. Lauer

1 these values to the oil in the ground.

2 Here is BDO. This is the audited report for the  
3 financial statements year ended December 31, 2013. And in  
4 their summary, you will see that they value Golden Gate and  
5 Black Elk together at 173 million total, fair value 173  
6 million.

7 Let's go to the BDO valuation report. This is year  
8 ended December 2013. The two years connected to incentive  
9 fees, 18 1/2 million 2012, and a little bit less, around 12  
10 million for 2013. You may find that there is no inflation and  
11 certainly no credible expert testimony of inflation for 2013.  
12 As of December 31, 2013, the company had estimated total proved  
13 oil, natural gas, and NGL reserves of 26, whatever that is, 45  
14 percent oil with a PV10 value of \$636 million based on the  
15 reserve report as of December 31, 2013, of Netherlands Sewell &  
16 Associates, Inc. ("NSAI Reserve Report"). For 2013, the  
17 company's net daily production average approximately 11,388  
18 Boepd. That is for Black Elk.

19 Let's go to DX 577. This is the valuation report.  
20 According to the third-party reserve report dated December 31,  
21 2013, it goes on, you have got 628,402,000 of probable  
22 undeveloped reserves, proved reserves, proved developed  
23 producing reserves, proved developed nonproducing reserves and  
24 619 million in proved undeveloped reserves, and the PV10 of net  
25 probable undeveloped reserves to be 151,908,000.

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Summation - Mr. Lauer

1           Because of time constraints, I would ask you, although  
2 not nearly as important because it only relates to this much  
3 smaller number of the management fees, look at the 2014  
4 Sterling quarterly reports and you will see the work that they  
5 did in 2014. Look at the VRC report and you will see how VRC,  
6 these expert valuers relied on reserves and came up with a  
7 range of values. And finally the CohnReznick report on 2014,  
8 DX 625, shows an unqualified audit opinion.

9           So when you look at all of that, you should consider  
10 that the only expert valuation evidence in this case—I'm going  
11 to repeat that—the only expert valuation evidence in the case  
12 is in the valuation reports that we introduced and in the audit  
13 reports that we introduced. You have all of that evidence.  
14 You can see the analysis. You can see that they are not --  
15 they are doing this professionally and they are doing it every  
16 three months. You have all of that, and then you have  
17 Quintero. You ask yourself, what's reality and what's an  
18 expert on the stand?

19           Now, the plaintiff and Quintero have no answer to the  
20 contemporaneous valuations. Instead, they call into question  
21 the valuations. And you may have been confused during the  
22 trial by a lot of sort of hit-and-run questions dealing with  
23 the Beechwood loan and is it disclosed, is it not disclosed.  
24 And frankly, you may find that no one ever connected any of  
25 those modest Beechwood loans with the actual valuation issue

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Summation - Mr. Lauer

1 for any of these assets.

2 But be that as it may, plaintiff and Quintero baldly  
3 suggested, well, you can't rely on these valuator. You can't  
4 rely on these two audit firms because they didn't have certain  
5 data. Certain data wasn't disclosed.

6 Now, ask yourselves, what actual evidence did  
7 plaintiffs show you that existed with respect to Black Elk in  
8 2012? What evidence was not publicly available that, according  
9 to them, had a material effect on the audit work or the  
10 valuation work? And all they can point to is, well, they  
11 didn't get e-mails. But they didn't show you anything about  
12 Black Elk in 2012, which is the key year on the incentive fees.  
13 They didn't show you a single document that you or anyone else  
14 could fairly conclude if they had that evidence the auditors  
15 and evaluators could not have issued the opinion.

16 Instead, let's see what they did say. Okay?

17 They said this Black Elk explosion, they almost said,  
18 I can't say that they said it explicitly, but the implication  
19 was this explosion was hidden from the auditors, hidden from  
20 the valuator. And yet, as Bernie Fuchs testified, it was in  
21 the *New York Times*. It was also in the Securities and Exchange  
22 Commission filings. You have the opportunity, they are in  
23 evidence, to flip through the SEC filings and you are going to  
24 see all the good and the bad that Black Elk filed about itself,  
25 including all of the reserve, the 1100 wells and the 232

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Summation - Mr. Lauer

1 platforms that were not affected by the explosion. That's  
2 DX 008.

3 Let's take a look at Black Elk's 10-Q for the third  
4 quarter 2013. And right up here, you will see the beginning of  
5 the Black Elk story. You are also going to see in Sterling,  
6 Sterling report discusses, West Delta, DX 552. I am just going  
7 to read it to you while they are showing it. This is DX 552.  
8 It is the fourth quarter of 2012, page 70. "following an  
9 explosion and fire on one of the company's oil pumping  
10 platforms in the Gulf of Mexico, shut in and not in production  
11 since August 2012, on November 21, 2012, S & P placed BEEOP on  
12 watch negative reflecting that the potential for further  
13 weakening of the company's credit profile and liquidity."  
14 Nothing said about being worthless.

15 And then BDO's valuation report for year ended 2013  
16 discusses the impact of West Delta. That's Exhibit 577 on page  
17 28. "Following an explosion and fire on one of the company's  
18 oil pumping platforms in the Gulf of Mexico since August 2012,  
19 it's on negative watch." This is the December 31, 2013 BDO  
20 valuation. As of December 31, 2013, this is a year after year  
21 ended 2012, the company had estimated total proved oil, natural  
22 gas and NGO reserves of 26 whatever that Mboe means with a PV10  
23 value of 636 million. "The company faced severe headwinds  
24 related to the November 2012 West Delta 32 incident. The  
25 incident negatively impacted the performance for the first nine

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Summation - Mr. Lauer

1 months of 2013."

2 You also heard about Beechwood as if that was a big  
3 secret. So let's go to DX 569. This is Beechwood is disclosed  
4 and PPVA's audited financials as a related party and disclosed  
5 that Beechwood bought Golden Gate's debt. On February 26,  
6 Beechwood, a related party of the general partner, purchased  
7 approximately 28 million of Golden Gate senior secured debt.  
8 And then on March 26, 2014, Golden Gate and Precious Capital  
9 amended the loan documents to waive any payment defaults  
10 through December 2014.

11 So far from being hidden, this is disclosed in the  
12 audit report.

13 What about the Black Elk Opportunity Fund? A fund  
14 that Mr. Bodner was asked to solicit investors for and did not.  
15 This is DX 008.

16 You will find that this is the Black Elk Opportunity  
17 Fund. It is expressly disclosed in Black Elk's public filings  
18 with the SEC. And you probably know this. When somebody is  
19 doing an audit, when somebody is doing a valuation about a  
20 company that has public filings, they are going to look at the  
21 public filings and you can reasonably assume that all of the  
22 significant information in the SEC filings was looked at and  
23 absorbed by valuers and auditors.

24 Finally, the Precious Capital transaction in which 50  
25 percent of Golden Gate was acquired by PPVA, let's look at

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Summation - Mr. Lauer

1 DX 569. So here is full disclosure of this transaction. "In  
2 October 2014, Precious Capital and Golden Gate amended the loan  
3 documents" and then this is disclosure of the Beechwood loan.

4 Do we have the Black Elk Opportunity Fund, DX 008?  
5 Anyway, this is disclosure of the famous Beechwood loan again.  
6 Okay. I am told to move on. But if you -- if you are  
7 interested, looking for the Precious Capital transaction, it is  
8 in DX 569 and page 41. It is disclosed in the audited  
9 financials.

10 I want to turn to damages. Obviously you don't have  
11 to deal with damages if you find David is not a fiduciary, if  
12 you find that David had no actual knowledge that the assets  
13 were being inflated. But the judge will instruct you on  
14 proximate cause and it's important to first identify, well,  
15 when, if you find that David somehow came to learn that the  
16 assets were inflated, you have to find, you know, when did that  
17 occur, and the exception to the general rule of proximate  
18 causation, the general rule of proximate causation is if I am  
19 doing something wrong and you have a right to claim from me, I  
20 can only be sued for what comes after. So if on January 1,  
21 2015, I did something -- failed to do something and I have  
22 liability, I can only be responsible for damages in this case,  
23 fees that are paid after January of 2015. I can't be  
24 responsible for something that occurred in '14 or '13 because I  
25 didn't cause it. But there is this exception. If you find



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Summation - Mr. Lauer

1 that somehow David and Murray Huberfeld or David and Mark  
2 Nordlicht concocted a scheme in which David agreed to  
3 participate and David Bodner basically sat with Murray  
4 Huberfeld or sat with Mark Nordlicht and said this great idea,  
5 let's bump up the inflated assets and that way we can steal  
6 money from the fund. If you find that, then it may not matter  
7 exactly when you find that David had actual knowledge.

8 But I think you will find it matters because there is  
9 really no evidence in this case whatsoever that David Bodner  
10 conspired with anyone to violate the law, conspired with anyone  
11 to defraud PPVA. You have seen David. You have seen the kind  
12 of person he is. Yes, there were times when he was a little  
13 bit emotional, as I think any one of us would be if we were  
14 facing the kind of devastating liability that they want to reap  
15 on him. But I believe you will find from this evidence or the  
16 absence of evidence there is no agreement to inflate assets.

17 And therefore, the only thing that you might be  
18 considering, if at all, would be, well, gee, is there a time  
19 when he did get actual knowledge? And the only thing that they  
20 can point to is this Fuchs dinner. And I submit to you, and we  
21 have gone through this, there is nothing in that Fuchs dinner  
22 that says these assets are fraudulently inflated. Okay.

23 It is their burden to prove damages, and the damages  
24 numbers that are on this chart, this is not gospel. It is not  
25 coming from the Bible. It is these made-up numbers from

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Summation - Mr. Lauer

1 Quintero who did this line. So if you are actually addressing  
2 damages, it is completely up to you to look at the valuation  
3 reports, to look at the numbers, and say, gee, I was not  
4 impressed with Quintero's integrity, I was not impressed with  
5 his -- with the way he answered questions, and I don't think  
6 there was any inflation and therefore no management fees and no  
7 incentive fees. Or you know what, maybe there was some  
8 inflation here, but it's completely up to you to say whether  
9 the management fees are 15 million, 9 million, 5 million, 2  
10 million. You don't have to accept numbers that Quintero drew  
11 on the dotted line. He could have done a valuation. He didn't  
12 do a valuation. If he had done a valuation, I would have had  
13 the opportunity to take him through it.

14 You also heard a lot of evidence about all the bad  
15 things that happened in 2015, 2016. You know, as I said  
16 earlier, at the end of December 2013, oil was at \$100. In  
17 January of 2016, when they are trying to raise money to save  
18 the fund, oil was \$30. It's a big difference. If your cost of  
19 production is over \$30, you are not going to make it up on  
20 volume.

21 So they quantified two areas of damage, incentive fees  
22 and management fees. Incentive fees are 18 1/2 million for  
23 2012 and roughly 12 million for 2013.

24 Now, for management fees, Quintero came in and said if  
25 you take my numbers, then the inflation is 15 1/2 million. But

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Summation - Mr. Lauer

1 Quintero also said I only -- I only did these charts for the  
2 specific asset. And I asked him, well, what about the rest of  
3 the fund? You have all these hundreds and hundreds of assets.  
4 So he said, I gave no opinion on that. In other words, you  
5 should assume the rest of the fund is completely in  
6 equilibrium.

7 In a way it is completely irrelevant to where do we  
8 find payment for the 15 million that Quintero says was  
9 inflated? And you will find, as we introduce in this case and  
10 as SanFilippo testified, Exhibit 687 and 690, these show, as of  
11 March 31, 2016, the end of the damages period—and there are  
12 two of these because one is for the domestic fund, one is for  
13 the international fund—this one shows management fees payable  
14 2,760,209 as of the end of February, 670,000 of the management  
15 fees was not paid, and as of March 31, 3,430,452.40 was not  
16 paid. Let's go to the other one. And for the other fund the  
17 number was 2,106,000.

18 So roughly 5,700,000, even if you accept Quintero's  
19 number, 5,700,000 of management fees that would have been paid  
20 if they had the money, was not paid. And as the Court will  
21 instruct you, damages in this case only relate to what was  
22 actually paid. So if you look at 687 and 690 and you agree  
23 that that shows in total 5.7 million of management fees  
24 payable, which means not paid, then even if you were to accept  
25 Quintero's numbers, the total maximum damage is 9.9 million.

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Summation - Mr. Lauer

1 And of course you are free to disregard those numbers and find  
2 no damage or some damage in management fees between zero and 9  
3 million 9.

4 Now, there is no dispute in this case that the 12.2  
5 million from 2013 and the 18 1/2 million from 2012 were paid.  
6 That's different for the management fees. This 5.7 million  
7 were not paid.

8 What you have seen when I took you through his chart,  
9 the 23.1 and the 24.1 for Black Elk and Golden Gate,  
10 Mr. Quintero, who was their damages expert, said for 2012 there  
11 was no inflation. He said that for Golden Gate and that he  
12 said for Black Elk, which means if you accept his reported  
13 number and not his winged-it number from the stand, there is no  
14 damage for 2012. And at most, they could recover for 2013, if  
15 you find that Golden Gate and Desert Hawk and Black Elk were  
16 inflated by his number or you could say, you know, I think  
17 maybe PPVA's numbers were a little high, but I don't agree with  
18 Quintero that it was so high, so the incentive fees are not 12  
19 million for 2013, they are 3 million or 4 million. That's  
20 completely up to you.

21 And you should compare the limited evidence that  
22 Quintero gave on how he came to his numbers because you are  
23 going to find -- you are going to look for a Quintero  
24 memorandum, you are going to look for something where Quintero  
25 explains why you should conclude that there is 12 1/2 million

Mcf2Pla4

Summation - Mr. Lauer

1 of damages based on inflated valuations in 20 -- for 2013, and  
2 you are going to find that he has no valuation report, he has  
3 no valuation memorandum. But what you have are the valuation  
4 reports by Sterling and you have the audit report by BDO to  
5 show that there was no inflation, that these were solid  
6 numbers, and there are no damages.

7 Because this issue of did David enter into some kind  
8 of dark conspiracy with Mark Nordlicht or Murray Huberfeld to  
9 defraud his friends and co-religioners, because that's such an  
10 important and scandalous claim, I want to take you through you  
11 a number of documents that you may find show the exact opposite  
12 of any kind of agreement with Mark Nordlicht to defraud the  
13 people in the fund.

14 And I'm not going to have time to put everything up on  
15 the screen because it takes a long time to put these up, but I  
16 will refer you to the famous busybody e-mail that is Exhibit  
17 Plaintiff 488. You may remember Mark Nordlicht writes an  
18 e-mail to David Levy: Why are you talk to go Bodner? He is a  
19 busybody. Just stop talking to him. That's no way to talk  
20 about your coconspirator.

21 Nordlicht and Fuchs, Fuchs writes to Nordlicht: You  
22 destroyed my simcha. That's Hebrew for celebration. You  
23 destroyed my celebration in some family event. And Nordlicht  
24 writes back: If anybody destroyed your celebration, it was  
25 those two guys. Another great comment by conspirators.

Mcf2Pla4

Summation - Mr. Lauer

1 Nordlicht writes PX 588: Bernie and I are going all  
2 in with our lives, and David, you have got to go call these  
3 people.

4 I would like to show 588. And here, this is where he  
5 sends an e-mail to Huberfeld to read this to Bodner. The  
6 frustrating part to me and Bernie when we discussed it is that  
7 we have gone all in with our lives, and we feel it is not the  
8 same for you guys. They are not conspirators. And then he  
9 says: I know it is embarrassing to go to people and say you  
10 need help, but at this point, that's where we are. Go to Izzy  
11 or Garfunkel or Schroen. If you invest in that, you would be  
12 doing me a big favor and I really think you would do well. Why  
13 aren't we doing this, Dovid? For all you have done for *Klal*  
14 *Yisroel*—that's the Jewish people—they would want to help you.  
15 You owe it to your future *tzdakkas*—those are your  
16 charities—to swallow your pride and allow, urge people to  
17 help.

18 What kind of a conspiracy is this? It is not  
19 following the plan.

20 Then you have 390 -- PX 590, which is Gerszberg coming  
21 to Murray and David and asking for money, and what you see is  
22 they are on the outside, the people working at Platinum for  
23 Mark are on the inside, and they are coming to them for money  
24 and they don't get the money. Again, what kind of a  
25 conspiracy?

Mcf2Pla4

Summation - Mr. Lauer

1           Then of course the famous dinner. If they have this  
2           conspiracy, why is David Bodner in front of Bernie Fuchs  
3           challenging Mark Nordlicht? They supposedly have this secret  
4           plan, this nefarious plan that they are going to engage in the  
5           scheme to defraud the PPVA investors, they are going to inflate  
6           the assets. And you have to ask yourself, since David Bodner  
7           has nothing to do with the valuations and he has nothing to do  
8           with running the business, if Mark Nordlicht wants to overvalue  
9           the assets, what does he need David Bodner for? Tell me one  
10          thing David Bodner contributed to the supposed conspiracy?  
11          It's an absolute lie. It's disgraceful.

12           You may find that every time Mark Nordlicht asks David  
13          to put in money or to find an investor he says no, no, no. So  
14          you may find there is no conspiracy just as there is no control  
15          and no knowledge.

16           And I'm not going to spend time on the questions to  
17          Mark Nordlicht. That was -- you may find that was a complete  
18          charade. Put a guy who is awaiting sentence, who facing  
19          criminal exposure, whose got a motion for a new trial, and ask  
20          all these questions. And my colleague, Mr. Hertzberg was  
21          right, the only question I should have asked Mr. Nordlicht is:  
22          Is the moon made out of green cheese?

23           So I mentioned, talked about Mr. Quintero, and the  
24          fact that as an expert if you find that he wasn't straight with  
25          you, you completely disregard his testimony, just disregard it,

Mcf2Pla4

Summation - Mr. Lauer

1 as you would someone else who, in a setting about whom you  
2 concluded that person is not being straight with me. If you  
3 find, when you think about it, when you think about what's in  
4 his report and what he said at trial, if you find that he  
5 wasn't straight with you, you are free to basically ignore  
6 everything he said.

7 I want to talk about the great Bill Post. All right?  
8 Bill Post came in here and he couldn't answer a direct  
9 question. Here is a guy who supposedly had prophetic vision  
10 comes in and says: I didn't talk to anybody who worked at  
11 Platinum, but I can tell you, looking at a couple of these  
12 e-mails, that David Bodner controlled Platinum. And then you  
13 show him some of these e-mails and it was ludicrous, right?  
14 You have that transaction where some guys in Israel had a  
15 borrower, and Mark says, I'm sold on the borrower. He is  
16 obviously not talking about David Bodner. And then two or  
17 three lines up, Tuchman, who is the guy in Israel who is going  
18 to work with Mark on this loan, says, oh, David, obviously  
19 referring to the borrower, says he found another lender. And  
20 Bill Post says, I believe that that is talking about David  
21 Bodner. And I say could it possibly be David Bodner if you  
22 think he is borrowing money from Mark Nordlicht? That was Bill  
23 Post. Bill Post was the guy who came in and told you that  
24 Bodner came to the office for 15 years five days a week. And I  
25 said what's that based on? The record. I said what record?



Mcf2Pla4

Summation - Mr. Lauer

1     Testimony, deposition, testimony, records, e-mails. Tell me  
2     one person's deposition who said that for 15 years, for 15  
3     years, Mr. Bodner came to the office five days a week for 15  
4     years. And he said, actually, I believe that's what you said  
5     in your opening statement. The Court had to remind Bill Post  
6     that what counsel says is not evidence.

7             Post is also the guy who came in and said if I borrow  
8     a hundred dollars from the bank and the bank says put up 200  
9     dollar asset as collateral and I said to him what's the amount  
10    of my liability? Well, I would say it would be \$300. Really?  
11    You have a \$200 asset, you borrowing \$100, and I think all of  
12    you can agree if you are borrowing \$100 your liability is \$100.  
13    But Bill Post, the man who couldn't answer a question, well, I  
14    would say it would be \$300 possibly because if you were unable  
15    to service your debt and they foreclosed, they would get the  
16    collateral plus you would still owe the \$100. That's the way  
17    collateral works.

18    "Q If I borrow 100 from the bank and I put up a \$200 asset, on  
19    that day that I borrow the 100, is it not a fact that the  
20    amount of my -- that the amount of my liability is only \$100?

21    "A No."

22             Really?

23             And then finally Mr. Post said if -- talked about the  
24    Black Elk Opportunity Fund, plaintiff trying to find some kind  
25    of scheme in the fact that some of the managers—not

Mcf2Pla4

Summation - Mr. Lauer

1 Mr. Bodner—raised a hundred million dollars from Fresh Capital  
2 to help Black Elk.

3 So I asked him:

4 "Q From the strict perspective of PPVA's value and PPVA's  
5 holdings, what happens when another company invests? So it's  
6 your testimony that you can put \$100 million of fresh money  
7 into a company and it doesn't add to the value of the company?  
8 I just want to understand your testimony.

9 "That's exactly my testimony."

10 I think you could find, like Mr. Quintero, Bill Post  
11 came here, he was programmed like a robot, and nothing he said  
12 has any significance on the questions in this case. Did Bodner  
13 control Platinum? Did he have a specific job or responsibility  
14 at PPVA? Did he have knowledge of fraud? You can disregard  
15 Bill Post.

16 You may find that from David Bodner's perspective the  
17 partner meetings and the meetings from time to time with  
18 Platinum portfolio managers is to get high level updates as to  
19 how the business was going, not evidence of control or  
20 responsibility.

21 There is simply nothing about a part owner of a  
22 business meeting with the managers in the business or even with  
23 investors that other people have brought in that reflects any  
24 undertaking by David Bodner to perform a duty or to take  
25 responsibility for anything at PPVA.

Mcf2Pla4

Summation - Mr. Lauer

1 Not one of the e-mails that they showed David indicate  
2 that is he accepted responsibility for a specific role or a  
3 specific duty. We ask you to study the evidence and recognize  
4 the spin for what it is. You heard so much about the Beechwood  
5 loan, and I mentioned this. They never connected Beechwood and  
6 the Beechwood loan with the claim in this case. How does that  
7 show that David Bodner knew that the PPVA assets were inflated  
8 intentionally?

9 We heard testimony from Latkin, Gerszberg, Steinberg,  
10 SanFilippo, Fuchs, and Huberfeld. Not one of them said David  
11 Bodner exercised control. Not one of them could point to a job  
12 that David had accepted. In fact, it seems that Gerszberg and  
13 David had very little understanding of the details in the  
14 fund's investments.

15 What is this case about? The plaintiff seeks tens of  
16 millions of dollars from David Bodner which you may find would  
17 be truly devastating to a man, his wife, his children, and his  
18 grandchildren who depend on him. Truly catastrophic to a man  
19 who has given his adult life to helping people both financially  
20 and with his own personal time. You have met David. You have  
21 seen him for two weeks, and at times Mr. Bodner did get  
22 emotional. You may find this case is extremely significant to  
23 him. The amount of money that plaintiff seeks in this case is  
24 extraordinary. When you review the evidence and you review  
25 every aspect of the Court's instruction, you may find that in

Mcf2Pla4

Summation - Mr. Lauer

1 2003, David Bodner made a lifestyle decision. He would put  
2 money into the fund, but he would not be involved in  
3 management. He would devote as much time as possible to  
4 personal investments and to communal activities. There is no  
5 evidence in this case that David Bodner knew that Mark  
6 Nordlicht or anyone else was intentionally inflating the assets  
7 to defraud PPVA.

8           There is no evidence that anyone, including the  
9 valuers, the auditors, or anyone working at Platinum ever  
10 expressed the view to David that Mark Nordlicht was defrauding  
11 the fund or that they considered these assets to be inflated.  
12 It shows -- in fact we have shown multiple reports of valuers  
13 and auditors who interacted with multiple portfolio managers at  
14 PPVA and not one of them ever said that they thought the assets  
15 were inflated and no one ever spoke with David Bodner to tell  
16 him, do you know, as an owner of this fund, that your assets  
17 are inflated?

18           So on the primary issue, the first issue that can  
19 knock this whole case out and basically end your deliberations,  
20 on the issue of significant control or a defined role or job at  
21 Platinum, I am going to end where I began two weeks ago:

22           There is absolutely no evidence that David Bodner  
23 controlled Platinum Management, had significant control of  
24 Platinum Management, or significant control at PPVA. And you  
25 know what I am going to say about control. On the issue of did

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1 David Bodner control Platinum or Mark Nordlicht? The emperor  
2 clearly has no clothes.

3 On behalf of David Bodner, thank you for your time,  
4 thank you for your attentiveness, and the seriousness by which  
5 I know you will deliberate.

6 I want to end on the following:

7 We have no burden. They have the burden. If you are  
8 in doubt, they lose. They have produced no evidence on the key  
9 issues in the case, they have not met their burden, and I urge  
10 you to do your sacred duty in this case and enter a verdict in  
11 favor of David of no liability.

12 Thank you.

13 THE COURT: Thank you very much.

14 Ladies and gentlemen, I want to mention one quick  
15 minor thing, and I stress it is minor.

16 In plaintiffs' counsel closing remarks he said a  
17 couple of times that I would instruct you about Mr. Nordlicht's  
18 taking the Fifth Amendment. Actually, it is not going to be  
19 part of my written instructions because I gave you an  
20 instruction at the time and it is only a collateral issue. But  
21 just to remind you, on the one hand, when someone takes the  
22 Fifth Amendment, you can, if you wish, infer that they are  
23 taking the Fifth because a true answer would be to admit  
24 whatever they are being asked about, such as overinflation. On  
25 the other hand, you can infer when someone takes the Fifth

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1 Amendment as to every question that they are simply following  
2 the advice of their counsel to assert the Fifth as to  
3 everything.

4 So those are inferences you both can -- either one of  
5 those you can draw. It is totally up to you. However, under  
6 no set of circumstances could you decide any element of this  
7 case solely on the inference you draw from the taking of the  
8 Fifth. It is at most a secondary issue. It is not a primary  
9 issue. It is not sufficient in itself to decide any issue in  
10 this case.

11 So now that you have heard that repeat instruction, I  
12 think it is time for you to forget about all of this again for  
13 just a short time, go to lunch, remember not to discuss the  
14 case even now among yourselves, because there is one other  
15 thing that is still going to come, and that's my instructions  
16 of law, and I'm going to give them to you—it will take about a  
17 half hour—right after lunch, and then the case will be yours  
18 to discuss and deliberate.

19 So have a good lunch and we will resume at 2:00.

20 (Continued on next page)

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(Jury not present)

THE COURT: Please be seated. Okay. We have now had a chance, thanks to my super law clerk to look at all the references in the transcript to those two charts, 924 and 925. And here is what the record shows:

924 was first called up on December 7. This is at page 966 of the transcript, beginning at line 3:

"Mr. Gluck: Mr. Parson, will you please call up Plaintiffs' Exhibit 924.

"Mr. Lauer: We object for the record, your Honor.

"The Court: Duly noted. Overruled."

This was to say the least ambiguous. Plaintiffs' counsel did not actually offer the exhibit. On the other hand, Mr. Landesman inferred that he was about to offer the exhibit and said we object, quote, for the record, which was perhaps not the strongest objection ever made. I denied the objection, but there is nothing there that expressly admitted 924.

The next time it comes up is, several days later, at 1539, beginning at line 4.

"Mr. Gluck: Mr. Parson, please call up Plaintiffs' Exhibit 924 which is already in evidence."

Not, frankly technically accurate. And then this is all of course, all of this is Quintero testimony and the reason for the delay was, as everyone remembers, we separated out his testimony into two different days.

Mcf2Pla4

1           So at that point Mr. Gluck says:

2       "Q Will you please take the jury through this chart.

3           "Mr. Lauer: I'm not sure it's in evidence.

4           "The Court: I think he is arguing as an aid to the  
5 jury in following the witness. It is not being offered into  
6 evidence."

7           Mr. Gluck initially says, "I think that's right." But  
8 then he says, "No, it's in evidence. There is another chart  
9 that I think that's coming. I misspoke. This chart is in  
10 evidence. It was admitted in evidence."

11          The Court says: "It must have been done on consent"

12          Mr. Gluck says: "It was done on consent. And it is  
13 one of the reasons we have that other issue."

14          The Court then says: "Now that it's been brought to  
15 my attention, these kinds of charts, ladies and gentlemen, are  
16 not themselves evidence. They are summaries of what the  
17 witness is testifying about. They are helpful to you sort of  
18 like a Power Point, in effect, but don't regard it as  
19 substantive evidence. You may take them in, since it was  
20 admitted, into the jury room and use it then to refresh your  
21 recollection what the witness said and so forth, but his  
22 testimony is the evidence and the underlying documents are the  
23 evidence, not the chart."

24          Now, first, in saying that, I relied on plaintiffs'  
25 counsel's erroneous statement that it was in evidence, not only



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1 that it was in evidence, but it was in evidence on consent.  
2 There is nothing in the record remotely to support that. But  
3 on the other hand, I indicated that it would be -- could be  
4 used as 925 were later used as an *aide memoire* to the jury.  
5 But my reference to its being taken into the jury room to be  
6 looked at, notwithstanding that it was only an *aide memoire* was  
7 premised on the representation, that I now see was erroneous,  
8 by plaintiffs' counsel that it had been received in evidence.

9 The last thing that happened was with respect to 925  
10 at page 1559, and that was shown to Mr. Quintero by Mr. Gluck.  
11 "Q Can you please take the jury through your calculations as  
12 to the overstated management fees for these six particular  
13 assets?

14 "Mr. Lauer: Excuse me. Is this in evidence?

15 "The Court: Is this in evidence? It's the same  
16 thing. It's not going to be -- if it's already been received  
17 in evidence, the jury will still only be able to use it as an  
18 aid. If it's not received in evidence, it's not received in  
19 evidence.

20 "Mr. Landesman: If it's not yet in evidence, I would  
21 like to *voir dire* if they are offering it."

22 I then took a sidebar, and at the sidebar I said, this  
23 is at page 1560, "Second, this is not being offered in evidence  
24 and the other one probably should not have been, but you  
25 consented to it." Again that's a misstatement based upon the

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1 representation by plaintiffs' counsel. And then I continue,  
2 "But this is just a chart that the jury can follow his  
3 testimony, so there is nothing to *voir dire*, so the request of  
4 *voir dire* is overruled."

5 So it is now clear to me that neither exhibit was ever  
6 received in evidence and therefore the only question is  
7 whether, nevertheless, they should be submitted to the jury  
8 with a notation that they are not in evidence but are being  
9 shown because they may be an aid.

10 I think on the record that I have just recited, they  
11 should not be sent to the jury initially. Based on long  
12 experience, I have a feeling we may well get a note from the  
13 jury asking for them and we will deal with how we deal with  
14 that then. Maybe there won't be a note. But that is just a  
15 hypothetical.

16 The immediate ruling is they are not to be submitted,  
17 and therefore nothing in the index should refer to them nor  
18 should hard copies of them be submitted.

19 Now, do we have the index in all other respects  
20 finished?

21 MS. SHEN: We do, your Honor.

22 THE COURT: And how about on the defense side?

23 MR. AMENT-STONE: Yeah, your Honor, I think we are  
24 using one --

25 THE COURT: Yes, it should be one, that's what I

Mcf2Pla4

1 requested.

2 MR. AMENT-STONE: Yes.

3 THE COURT: Let me see the index.

4 Also you have all the exhibits ready to go? Okay, is  
5 it just that? My question is do we need a cart or not?

6 MR. AMENT-STONE: I think not, your Honor.

7 THE COURT: Okay, terrific. Excellent. So let me  
8 look at the index.

9 Okay. So I think we are ready to go. And unless  
10 anyone has anything else, you are all free to go to lunch. See  
11 you at 2:00.

12 (Luncheon recess)

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## AFTERNOON SESSION

2:05 p.m.

THE COURT: Please be seated.

Ladies and gentlemen, we're going to -- we all set? What's the problem? Okay.

We're going to read the instructions of law together now and then you'll have them to take with you into the jury room.

So, if you look at the second page of the table of contents, you'll see there are first a bunch of general instructions. These are instructions that are the same, not just for this case, but for all civil cases. Then there are the instructions relating to the charge of this case. You may remember from the preliminary instruction that there were initially two charges, breach of fiduciary duty and fraud. The fraud charge is no longer part of the case and don't speculate about that. It's all down to a single claim of breach of fiduciary duty. Then, if you find there is liability, then there is the instruction of how you calculate damages. That's the legal word for money. We don't use simple words in the law, we always use complicated and obscure words. So instead of using the word money, we use the word damages, but just to let you in on the secret, it means money. Finally, there are some concluding instructions about how you fill out your verdict form.

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1           So let's turn to the first general instruction on  
2 page 3.

3           We are now approaching the most important part of this  
4 case, your deliberations. You have heard all the evidence in  
5 the case, as well as the final arguments of the lawyers for the  
6 parties. Before you retire to deliberate, it is my duty to  
7 instruct you as to the law that will govern your deliberations.  
8 These are the final and binding instructions, which entirely  
9 replace the preliminary instruction I gave you at the start of  
10 the case, which you should now discard.

11           Regardless of any opinion that you may have as to what  
12 the law may be or ought to be, it is your sworn duty to follow  
13 the law as I give it to you. Also, if any attorney or other  
14 person has stated a legal principle different from any that I  
15 state to you in my instructions, it is my instructions that you  
16 must follow.

17           Because my instructions cover many points, I have  
18 provided each of you with a copy of them, not only so that you  
19 can follow them as I read them to you now, but also so that you  
20 can have them with you for reference throughout your  
21 deliberations. In listening to them now and reviewing them  
22 later, you should not single out any particular instruction as  
23 alone stating the law, but you should instead consider my  
24 instructions as a whole.

25           Your duty is to decide the fact issues in the case and

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1 arrive, if you can, at a verdict. You, the members of the  
2 jury, are the sole and exclusive judges of the facts. You pass  
3 upon the weight of the evidence; you determine the credibility  
4 of the witnesses; you resolve such conflicts as there may be in  
5 the testimony; and you draw whatever reasonable inferences you  
6 decide to draw from the facts as you determine them.

7 In determining the facts, you must rely upon your own  
8 recollection of the evidence. To aid your recollection, we  
9 will send you all the exhibits at the start of your  
10 deliberations, together with an index to help you find what you  
11 want. If you need to review particular items of testimony, we  
12 can also arrange to provide them to you in transcript or  
13 read-back form.

14 Please remember that none of what the lawyers have  
15 said in their opening statements, in their closing arguments,  
16 in their objections, or in their questions, is evidence. Nor  
17 is anything I may have said evidence. The evidence before you  
18 consists of just three things: the testimony given by witnesses  
19 that was received in evidence, the exhibits that were received  
20 in evidence, and any stipulations of the parties as to matters  
21 in evidence.

22 Testimony consists of the answers that were given by  
23 the witnesses to the questions that were permitted to be asked  
24 here in court. Please remember that questions, although they  
25 may provide the context for answers, are not themselves

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1 evidence; only answers are evidence, and you should therefore  
2 disregard any question to which I sustained an objection.

3 Also, you may not consider any answer that I directed you to  
4 disregard or that I directed be stricken from the record.

5 Likewise, you may not consider anything you heard about the  
6 contents of any exhibit that was not received in evidence.

7 More generally, you should be careful not to speculate  
8 about matters not in evidence. Your focus should be solely on  
9 the evidence that was presented here in court.

10 It is the duty of the attorney for each side of a case  
11 to object when the other side offers testimony or other  
12 evidence that the attorney believes is not properly admissible.  
13 Counsel also have the right and the duty to ask the Court to  
14 make rulings of law and to request conferences out of the  
15 hearing of the jury. All such questions of law must be decided  
16 by me. You should not show any prejudice against any attorney  
17 or party because the attorney objected to the admissibility of  
18 evidence, asked for a conference out of the hearing of the  
19 jury, or asked me for a ruling on the law.

20 I also ask you to draw no inference from my rulings or  
21 from the fact that on occasion I asked questions of certain  
22 witnesses. My rulings were no more than applications of the  
23 law and my questions were only intended for clarification or to  
24 expedite matters. You should understand that I have no opinion  
25 as to the verdict you should render in this case.

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1           You are to form your duty of finding the facts without  
2       bias or prejudice or sympathy or hostility as to any party, for  
3       all parties are equal under the law. You are to perform your  
4       final duty in an attitude of complete fairness and  
5       impartiality. You are not to be swayed by rhetoric or  
6       emotional appeals. It must be clear to you that if you were to  
7       let extraneous considerations interfere with your thinking,  
8       there would be a risk that you would not arrive at a true and  
9       just verdict. So do not be guided by anything except clear  
10      thinking and calm analysis of the evidence.

11           As you know, this is a civil case. In a civil case, a  
12      party who is making a claim against another party has what we  
13      call the burden of proof, which is the burden of establishing  
14      each of the essential elements of that claim. Here, it is the  
15      plaintiffs who have the burden of proof.

16           As it turns out, there is now only one claim against  
17      Mr. Bodner that you are called upon to consider: a claim for  
18      breach of fiduciary duty. I will describe the essential  
19      elements of this claim shortly, but for now, keep in mind that  
20      plaintiffs must prove each of the essential elements of that  
21      claim by a preponderance of the credible evidence. The  
22      credible means that such evidence that you find worthy of  
23      belief. To establish an element by a claim of preponderance of  
24      the credible evidence means to prove that that element is more  
25      likely true than not true.



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1           When assessing whether the party bringing a claim has  
2 met its burden of proof as to that claim, the question is not  
3 which party called the greater number of witnesses as to that  
4 claim or how much time one party or another spent on it during  
5 the trial. The focus must always be on the quality of the  
6 evidence: its persuasiveness in convincing you of its truth.

7           In deciding whether a party meets its burden of proof,  
8 you may consider both direct evidence and circumstantial  
9 evidence.

10          Direct evidence is evidence that proves a fact  
11 directly. For example, where a witness testifies to what he or  
12 she saw, heard, or observed, that is called direct evidence.

13          Circumstantial evidence is evidence that tends to  
14 prove a fact by proof of other facts. To give a simple  
15 example, suppose that when you came into the courthouse today  
16 the sun was shining and it was a nice day, but the courtroom  
17 blinds were drawn and you could not look outside. Later, as  
18 you were sitting here, someone walked in with a dripping wet  
19 umbrella, and, soon after, somebody else walked in with a  
20 dripping wet raincoat. Now, on our assumed facts, you cannot  
21 look outside the courtroom and you cannot see whether it is  
22 raining. So you have no direct evidence of that fact. But on  
23 the combination of the facts about the umbrella and the  
24 raincoat, it would be reasonable for you to infer that it had  
25 begun raining.

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1           That is all there is to circumstantial evidence.  
2       Using your reason and experience, you infer from established  
3       facts the existence or the nonexistence of some other fact.  
4       Please note, however, it is not a matter of speculation or  
5       guess; it is a matter of logical inference.

6           The law makes no distinction between direct and  
7       circumstantial evidence. Circumstantial evidence is of no less  
8       value than direct evidence, and you may consider either or  
9       both, and may give them such weight as you conclude is  
10      warranted.

11          It must be clear to you by now that counsel for the  
12      opposing parties are asking you to draw very different  
13      conclusions about various factual issues in the case. An  
14      important part of that decision will involve making judgments  
15      about the testimony of the witnesses you have listened to and  
16      observed. In making these judgments, you should carefully  
17      scrutinize all of the testimony of each witness, the  
18      circumstances under which each witness testified, and any other  
19      matter in evidence that may help you to decide the truth and  
20      importance of each witness's testimony.

21          Your decision to believe or not believe a witness hay  
22      depend on how that witness impressed you. How did the witness  
23      appear to you? Was the witness candid, frank, and forthright,  
24      or did the witness seem to be evasive or suspect in some way.  
25      How did the way the witness testified on direct examination

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1 compare with how the witness testified on cross examination?  
2 Was the witness consistent or contradictory. Did the witness  
3 appear to know what he or she was talking about? Did the  
4 witness strike you as someone who was trying to report his or  
5 her knowledge accurately. These are examples of the kinds of  
6 common sense questions you should ask yourself in deciding  
7 whether a witness is or is not truthful.

8 How much you choose to believe a witness may also be  
9 influenced by the witness's bias. Does the witness have a  
10 relationship with any of the parties that may affect how he or  
11 she testified. Does the witness have some interest, incentive,  
12 loyalty, or motive that might cause him or her to shade the  
13 truth. Does the witness have some bias, prejudice, or  
14 hostility that may cause the witness to give you something  
15 other than a completely accurate account of the facts he or she  
16 testified to?

17 You should also consider whether the witness had an  
18 opportunity to observe the facts he or she testified about, and  
19 whether the witness's recollection of the facts stands up in  
20 light of the other evidence in the case.

21 In other words, what you must try to do in deciding  
22 credibility is to size up a person just as you would in any  
23 important matter where you are trying to decide if a person is  
24 truthful, straightforward, and accurate in his or her  
25 recollection.

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1           Some of the testimony before you was in the form of  
2 excerpts from depositions that were received in evidence and  
3 read during the trial. A deposition is simply a procedure  
4 whereby, prior to trial, the attorneys may question a witness  
5 or a party under oath before a court stenographer. You should  
6 consider the deposition testimony received at trial according  
7 to the same standards you would use to evaluate the testimony  
8 of a witness given in live court.

9           The law permits parties to offer testimony from  
10 witnesses who were not involved in the underlying events of the  
11 case, but who, by education or experience, profess to expertise  
12 in a specialized area of knowledge. In this case, the only  
13 such witnesses who testified were William Post and Ronald  
14 Quintero, both of whom were called by the plaintiffs.  
15 Specialized testimony is presented to you on the theory that  
16 someone who is learned in the field may be able to assist you  
17 in understanding specialized aspects of the evidence.

18           However, your role in judging credibility and  
19 assessing weight applies just as much to these witnesses as to  
20 other witnesses. When you consider the specialized opinions  
21 that were received in evidence in this case, you may give them  
22 as much or as little weight as you think they deserve. For  
23 example, a specialized witness necessarily bases his or her  
24 opinions, in part or in whole, on what that witness learned  
25 from others, and you may conclude that the weight given the

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1 witness's opinions may be affected by how accurate or  
2 inaccurate that underlying information is. More generally, if  
3 you find that the opinions of a specialized witness were not  
4 based on sufficient data, education, or experience, or if you  
5 should conclude that the trustworthiness or credibility of such  
6 a witness is questionable, or if the opinion of the witness is  
7 outweighed, in your judgment, by other evidence in the case,  
8 then you may, if you wish, disregard the opinions of that  
9 witness, entirely or in part. On the other hand, if you find  
10 that a specialized witness is credible, and that the witness's  
11 opinion are based on sufficient data, education, and  
12 experience, and that the other evidence does not give you  
13 reason to doubt the witness's conclusions, you may, if you  
14 wish, rely on that witness's opinions and give them whatever  
15 weight you deem appropriate.

16 With these general instructions in mind, let me now  
17 turn to the claim in this case, a claim for fiduciary breach.  
18 Plaintiffs Martin Trott and Christopher Smith are  
19 court-appointed liquidators suing on behalf of Platinum  
20 Partners Value Arbitrage Fund, L.P., they assert that the  
21 defendant, David Bodner, breached a fiduciary duty he had to  
22 PPVA and its investors by failing to disclose to PPVA and its  
23 investors his alleged knowledge that PPVA's assets were  
24 overvalued and/or by failing to object to the payment by PPVA  
25 of incentive and management fees to which he allegedly knew he

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1 and other persons or entities were not entitled.

2 In assessing this claim, you must first determine,  
3 according to my instructions, whether the plaintiffs have  
4 proved each essential element of this claim. This is known as  
5 establishing liability. If you determine that the defendant is  
6 liable on plaintiffs' claim, you must then decide whether the  
7 release agreement nevertheless relieves Mr. Bodner of  
8 liability. Finally, if you find that the defendant is liable  
9 on plaintiffs' claim and that the release agreement does not  
10 bar the claim, you will have to determine what are called  
11 damages, that is, the amount of money to be paid by Mr. Bodner  
12 on the claim.

13 Against this background, let us now discuss the  
14 essential elements of the plaintiffs' claim of breach of  
15 fiduciary duty.

16 Specifically, plaintiffs' claim is that Mr. Bodner  
17 breached a fiduciary duty to PPVA and its investors by failing  
18 to disclose to PPVA and its investors his knowledge of the  
19 alleged overvaluation of PPVA's assets and/or by failing to  
20 object to payment of incentive and management fees to which he  
21 allegedly knew he and other persons or entities were not  
22 entitled.

23 To prove their breach of fiduciary duty claim,  
24 plaintiffs must prove by a preponderance of the evidence each  
25 of the three essential elements. The first is that Mr. Bodner

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1 owed a fiduciary duty to PPVA and its investors. What is a  
2 fiduciary duty? It is a special duty of care that is created  
3 when one party, with the other party's knowledge and consent,  
4 reasonably puts its trust and confidence in the other party to  
5 carry out a particular role or undertake a particular duty on  
6 behalf of the first party. In particular, those who manage the  
7 investments of an investment fund owe a fiduciary duty to the  
8 fund and its investors. Although Mr. Bodner was not an officer  
9 of PPVA, plaintiffs argue that, through Platinum Management and  
10 otherwise, Mr. Bodner exercised significant control over PPVA's  
11 management of its investments and thereby assumed a fiduciary  
12 duty to PPVA and its investors. Mr. Bodner denies that he  
13 exercised any such control. So, this is the first issue you  
14 will need to resolve.

15 Second, if you find that Mr. Bodner owed a fiduciary  
16 duty to PPVA and its investors, you must then determine whether  
17 Mr. Bodner breached that fiduciary duty by failing to disclose  
18 to PPVA and its investors the alleged overvaluation to the  
19 fund's assets that he allegedly knew about and/or by failing to  
20 object to payment of incentive and management fees to which he  
21 allegedly knew he and other persons or entities were not  
22 entitled. One who owes a fiduciary duty to a fund and its  
23 investors is required to act in good faith to advance the  
24 interests of the persons and entities to whom he owes the duty.  
25 This includes a continuing duty to truthfully and fully

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1 disclose to the persons and entities to whom he owes the duty  
2 all material facts, meaning any facts that would be material to  
3 these persons and entities in making an investment or financial  
4 decision. He also owes these persons and entities his  
5 undivided loyalty and may not obtain an improper advantage for  
6 himself or otherwise act in any manner contrary to their  
7 interests. In short, if Mr. Bodner had a fiduciary duty to  
8 PPVA and its investors, which he denies, and if the fund's  
9 assets were overvalued and he knew about this, which he also  
10 denies, then he would have had a duty to disclose this  
11 knowledge to the investors, as well as a duty to object to the  
12 payment of incentive and management fees to which he knew and  
13 other persons or entities were not entitled.

14 Third, and finally, if you find that Mr. Bodner owed a  
15 fiduciary duty to PPVA and its investors and that he knowingly  
16 breached that fiduciary duty by failing to disclose his alleged  
17 knowledge of the alleged overvaluation of the fund's assets  
18 and/or by failing to object to payment of incentive and  
19 management fees to which he knew he was not entitled, you must  
20 then determine whether the fund and its investors were  
21 financially damaged as a result of Mr. Bodner's failure to  
22 disclose this knowledge. Here, again, the parties are in  
23 dispute. For example, they differ considerably as to the  
24 amounts of incentive and management fees that were allegedly  
25 wrongfully paid as a result of Mr. Bodner's alleged fiduciary



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1 breach. Again, this is a dispute you must resolve, remembering  
2 at all times that it is the plaintiffs' burden to prove each of  
3 the essential elements of their fiduciary breach claim by a  
4 preponderance of the evidence.

5 If, but only if, you find that plaintiffs have proved  
6 the essential elements of their claim that Mr. Bodner breached  
7 a fiduciary duty to PPVA and its investors, you must then  
8 determine whether Mr. Bodner must still be found not-liable on  
9 that claim because he was released from liability by the  
10 release agreement dated March 20, 2016, which was signed by  
11 Mr. Bodner in his personal capacity and by Mark Nordlicht on  
12 behalf of Platinum Management.

13 Specifically, the release agreement, if it is valid,  
14 absolves Mr. Bodner from any liability for plaintiffs'  
15 fiduciary breach claim. However, there is an important  
16 exception. If you find by a preponderance of the evidence that  
17 Mr. Nordlicht or Platinum Management also engaged in the same  
18 fiduciary breach that you have found Mr. Bodner liable for,  
19 then the release is unenforceable as to that claim. This is  
20 because two persons or entities liable for the same misconduct  
21 cannot lawfully agree to release each other from liability for  
22 that misconduct.

23 If you have found Mr. Bodner liable on plaintiffs'  
24 fiduciary breach claim and have also found that the release is  
25 unenforceable as to that claim, then you must determine the sum

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1 of money that must be paid by Mr. Bodner to the plaintiffs as a  
2 result of his fiduciary breach. These sums of money are called  
3 damages, and the plaintiffs bear the burden of proving the  
4 amount of these damages by a preponderance of the credible  
5 evidence.

6 Generally speaking, an injured party is entitled to  
7 recover from a liable party the sum of money that will justly  
8 and fairly compensate the injured party for the injuries that  
9 were proximately caused by the misconduct of the liable party.  
10 An injury is proximately caused by the misconduct of the liable  
11 party if that misconduct was a substantial factor in causing  
12 the injury. With respect to the breach of fiduciary duty,  
13 then, the measure of damages is how much money the fund and its  
14 investors lost as a proximate result of Mr. Bodner's fiduciary  
15 breach.

16 Please note that Mr. Bodner is liable only for the  
17 damages proximately caused by his own acts that constituted the  
18 breach of fiduciary duty unless plaintiffs also prove by a  
19 preponderance of the credible evidence that he intentionally  
20 entered into an agreement, explicitly or implicitly, with  
21 Mr. Nordlicht and/or Mr. Huberfeld, to defraud the investors by  
22 hiding the fact that the fund's assets were overvalued, in  
23 which case he is also liable for the damages caused by  
24 Mr. Nordlicht and/or Mr. Huberfeld. This might include, for  
25 example, the allegedly inflated amount of any management fees

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1 paid in cash during the relevant period, as well as the  
2 allegedly inflated amount of any incentive fees paid in cash or  
3 redeemed as cash during the relevant period.

4 In calculating damages, do not concern yourself with  
5 the possibility that other persons may have already paid or  
6 been ordered to pay some of the damages. Such set-offs will be  
7 determined by the Court and duly deducted from any sum of  
8 damages that you calculate.

9 You will shortly retire to the jury room to begin your  
10 deliberations. As soon as you get to the jury room, please  
11 select one of your number as the foreperson, to preside over  
12 your deliberations and to serve as your spokesperson if you  
13 need to communicate with the Court.

14 You will be bringing with you into the jury room a  
15 copy of my instructions of law and a verdict form on which to  
16 record your verdict.

17 Let me pause there for one second, ladies and  
18 gentlemen. I think you already saw this up on the screen  
19 during one of the closing arguments, but this is the verdict  
20 form. It's a simple form that asks you four questions. First  
21 question is whether on the fiduciary breach claim you find  
22 Mr. Bodner liable or not liable, you'll check the relevant box.  
23 If you find not liable, that's the end, you just sign the form  
24 and don't bother with the other questions. If you find liable,  
25 then you go to the second question which is whether the release

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1 bars liability or does not bar liability. And again, you'll  
2 check the relevant box. If you find the release does not bar  
3 liability, then you would go and the third question of the  
4 calculation of damages, and finally, there's a fourth and  
5 special question because of certain legal issues that I wont  
6 bore you with, and that is for you to indicate how much of the  
7 damages, if any, is for incentive fees based on the 2012 net  
8 asset value. Southern District.

9 So after you have completed your verdict form, your  
10 foreperson will sign it, date it, and seal it in this envelope  
11 very clearly marked verdict, and that will then be brought to  
12 me and I will not open it until all nine of you are back here  
13 in the courtroom. Then we will read it and ask each of you  
14 individually whether that is your verdict. And we do that just  
15 to be absolutely sure that we have your verdict as you have  
16 decided.

17 Back to the instructions.

18 In addition, we will send into the jury room all the  
19 exhibits that were admitted into evidence, along with an index  
20 so you can locate what you want. If you want any of the  
21 testimony, that can also be provided, in either transcript or  
22 read-back form. But please remember that it is not always easy  
23 to locate what you might want, so be as specific as you  
24 possibly can be in requesting portions of testimony.

25 Any of your requests, in fact any communication with

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1 the Court, should be made to me in writing, signed by your  
2 foreperson, and given to the marshal, who will be available  
3 outside the jury room throughout your deliberations. After  
4 consulting with counsel, I will respond to any question or  
5 request you have as promptly as possible, either in writing or  
6 by having you return to the courtroom so that I can speak with  
7 you in person.

8 You should not, however, tell me or anyone else how  
9 the jury stands on any issue until you have reached your  
10 verdict and recorded it on your verdict form.

11 Each of you must decide the case for yourself, after  
12 consideration, with your fellow jurors, of the evidence in the  
13 case, and your verdict must be unanimous. In deliberating,  
14 bear in mind that while each juror is entitled to his or her  
15 opinion, you should exchange views with your fellow jurors.  
16 That is the very purpose of jury deliberation – to discuss and  
17 consider the evidence; to listen to the arguments of fellow  
18 jurors; to present your individual views; to consult with one  
19 another; and to reach a verdict based solely and wholly on the  
20 evidence.

21 If, after carefully considering all the evidence and  
22 the arguments of your fellow jurors, you entertain a  
23 conscientious view that differs from the others', you are not  
24 to yield your view simply because you are outnumbered. On the  
25 other hand, you should not hesitate to change or modify an

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1 earlier view that, after discussion with your fellow jurors,  
2 now appears to you erroneous.

3 In short, your verdict must reflect your individual  
4 views and it must also be unanimous.

5 This completes my instructions of law.

6 Now, before we swear in the marshal, first, all  
7 previously argued objections to any portion of the charge are  
8 hereby deemed renewed and denied.

9 Is there anything else any counsel needs to approach  
10 the Court about?

11 MR. GLUCK: No, your Honor. Thank you.

12 MR. LAUER: No, your Honor.

13 THE COURT: Very good. You can deliberate as long as  
14 you need. It's totally up to you. If you want to deliberate  
15 past 4:30, you need to, either today or tomorrow, you need to  
16 let us know by 4 o'clock so we can make the appropriate  
17 arrangements. But whatever time you decide to deliberate  
18 until, you haven't reached a verdict by that time, then you  
19 should all just go home, still not discussing the case with  
20 anyone, and come back tomorrow morning at 9:30 and resume your  
21 deliberations. And whoever you choose as your foreperson must  
22 make sure that the deliberations do not recommence until all  
23 nine of you are back.

24 All right. I think we're ready to swear in the  
25 marshal.

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(Marshal sworn)

THE DEPUTY CLERK: Jurors, please follow the marshal.

(Jury not present)

THE COURT: All right. Just a couple of final housekeeping items. I have marked one copy of my chart as Court Exhibit 1, and it will be docketed.

Second, let me remind you what I mentioned yesterday. At all times, you must be on this floor, one lawyer from each side can respond to any notes, questions the jury has. Don't need more than one. Mr. Bodner, you are welcome to stay or not as you please. We always need at least that one lawyer until the jury ends for the day or whatever. If we go into tomorrow, I'll tell the jury the lawyers will be excused from 1:00 to 2:00 for lunch, so they shouldn't send out any notes during that period.

Anything else that we need to talk about today?

I have a feeling some of you may need a little sleep, but stick around, at least one lawyer from each side, and we'll see you today or tomorrow.

As soon as my courtroom deputy returns from the jury room, please hand her the exhibits and the index and she'll take them right into the jury room.

(Continued on next page)

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(In open court; jury not present)

THE COURT: We have several notes. The first note, which we have marked as jury note 1, says, "What is the definition of significant control?" And this is obviously a reference to instruction 10. And the second paragraph, this is the instruction now, "Although Mr. Bodner was not an officer of PPVA, plaintiffs argue that through Platinum Management and otherwise Mr. Bodner exercised significant control over PPVA's management of its investment."

So let me hear from first plaintiffs' counsel and then from defense counsel as to what you think we should say in response to that first note.

MR. MAGRUDER: Thank you, your Honor. I just want to note before I start, and I'm happy to speak to the note of the jury. I already spoke with your clerk. The lead counsel for plaintiffs, Mr. Gluck, was having a little bit of a health issue and needed to go eat. He intended to come back all along, and he is in a cab right now.

THE COURT: He didn't advise me in advance that he was leaving and he knew that I had stated, not once, but twice, that there had to be attorneys who could respond to notes. So is your question whether I should hold him in contempt?

MR. MAGRUDER: That's not my question, your Honor. It is just to -- if it's at all possible. Of course I am happy to answer, and I can answer if ordered right now.



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1 THE COURT: I'm sorry he is not feeling well, but  
2 throughout this trial you were here and in fact there was an  
3 endless cast of lawyers at your table as well as your  
4 adversary's table, so that request is denied.

5 MR. MAGRUDER: Thank you. Understood.

6 So, your Honor, in response to the question what is  
7 the definition of "significant control," plaintiffs submit that  
8 significant control in this context would be a nonpassive role  
9 within the investment manager as exemplified by involvement in  
10 investor relation, involvement in personnel and employment  
11 decisions, involvement in transactions, bringing in deals, kind  
12 of -- that's kind of what I can say for now.

13 THE COURT: Okay. Thank you very much. Let me hear  
14 from defense counsel.

15 MR. LAUER: The Second Circuit uses the description  
16 "idea facto control" and "dominance" but that is not -- I doubt  
17 that is in the context that was clear here that we weren't  
18 saying he had the final say. No one -- I think the -- it is --  
19 and this is not the wording, but just the idea we can talk  
20 about the wording, I think what the Court and, frankly, what I  
21 think the parties intended to convey by that language, which  
22 they approved, was that he had the ability to exercise  
23 meaningful determination over investments. It would not be  
24 enough that he just expressed his views on investments. That  
25 wouldn't be control. But it wasn't as much as he had the final

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1 say. We wouldn't have used the word "significant" if we wanted  
2 to convey "final say," we would have said "final say." So it  
3 is something in between, and the question is finding the right  
4 language to express it.

5 If I remember Mr. Gluck in his closing argument talked  
6 about practical control or words to that effect, and I think  
7 maybe the answer is something along the lines of as a practical  
8 matter he could either veto or require certain investments,  
9 something like that. But it is more than just having a say,  
10 that is clear.

11 Your Honor, would your Honor consider "singularly have  
12 the ability"? I think the issue -- the issue in the case, it  
13 is a little murky, right, and I think the way this case was  
14 tried from the beginning to the end is that Bodner has real  
15 authority on his own --

16 THE COURT: I think the analogy that was being used by  
17 plaintiffs' counsel, and I think it is a reasonable analogy, is  
18 in plaintiffs' view, obviously contested by the defense, there  
19 were really three people who were still in meaningful control.  
20 If we analogize to partnership law, for example, each member of  
21 the partnership would have meaningful control over how a  
22 partnership invested its monies even though, if it was a true  
23 partnership, two might be able to outvote the third.

24 So but I think it has to be something along the lines  
25 that he had the ability, because I don't want to hang them up

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1 with questions of legal power. He had the practical act to  
2 determine that a particular investment could be vetoed or that  
3 a particular investment would be made, something along those  
4 lines. Let me just right that down. Hold on.

5 MR. LAUER: Thank you, your Honor.

6 THE COURT: We will hold on that for a minute. Let's  
7 take a look at the next. We just got a fourth note from the  
8 jury. We have a third one, as well. You have only received  
9 copies so far of the first two. I will get you copies of the  
10 third and fourth in a minute.

11 The fourth one is jury would like to stay until 5 p.m.  
12 today. Any objection for that?

13 MR. MAGRUDER: No objection, your Honor.

14 MR. LAUER: None.

15 THE COURT: Okay. So I will have my courtroom deputy  
16 just go in now and tell them that they can stay until 5:00 and  
17 that we are working on a response to their other three notes.

18 The second note, which we marked as jury note 2, is,  
19 "What is the definition of specific role or duty?" This is in  
20 the first paragraph of instruction 10, "What is a fiduciary  
21 duty? It is a special duty of care that is created when one  
22 party, with the other party's knowledge and consent, reasonably  
23 puts its trust and confidence in the other party to carry out a  
24 particular role or undertake a particular duty on behalf of the  
25 first party."

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1 But then I add in my instruction "in particular those  
2 who manage the investments of an investment fund owe a  
3 fiduciary duty to the fund and its investors."

4 So I am inclined to answer the second note by saying  
5 as relevant in this case we are talking with the -- we are  
6 talking about whether he had meaningful control over the  
7 investments. I really think it dovetails with the other.

8 Any response from plaintiffs' counsel?

9 MR. MAGRUDER: Your Honor, just briefly. We would  
10 just.

11 THE COURT: You can be seated, but just speak into the  
12 microphone.

13 MR. MAGRUDER: Oh. We would just submit that the  
14 specific role or duty does not require -- did not require  
15 Mr. Bodner to have any sort of formal title.

16 THE COURT: Yes. I think I said that.

17 MR. MAGRUDER: Just wanted to reiterate that.

18 THE COURT: But I think you are right, we should put  
19 in something along those lines to make clear.

20 MR. MAGRUDER: Thank you, your Honor.

21 THE COURT: All right.

22 The third note is a request for testimony and that  
23 reads, this is jury note 3, "Can we get testimony from  
24 Mr. Bodner? Specifically last five minutes of the  
25 cross-examination before recross?" I don't know quite how we

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1 are going to figure out five minutes, but I think we can make a  
2 good try. And the note continues, "And also when he testified  
3 about coming back and forth to the city."

4 So here is what I suggest we do. I will get you a  
5 copy of that note as well as note 4 in the next couple of  
6 minutes. You should work together to prepare the transcript to  
7 go in with a response to note 3. If you have disagreements, I  
8 will come up and resolve them. If you don't have  
9 disagreements, you can just let my courtroom deputy know and we  
10 will take it in. We will let them know that -- we will give  
11 them one copy initially and then if they want multiple copies  
12 we will tell them that we can make nine copies for them.

13 In preparing the transcript, as I know you have daily  
14 copy, but you can also work with our court reporter to get a  
15 fresh copy if necessary. You do not have to eliminate stuff  
16 that is objected to even if the objection was sustained. They  
17 have been told to disregard it. That's good enough. But you  
18 do have to redact any side bar.

19 So why don't you work on that. I will work on putting  
20 a note together responsive to number one and two, I will come  
21 back and give you that proposal, and then we can proceed from  
22 there.

23 (Recess pending verdict)

24 THE COURT: I see you can back, Mr. Gluck. I hope you  
25 are feeling better.

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1 MR. GLUCK: Thank you.

2 THE COURT: So here is my proposed response to the  
3 notes so far received. After I read it, I will ask for any  
4 comments, objection, changes, or additions from each side:

5 To the jury:

6 Thank you for your four notes.

7 In your first note, you ask "what is the definition of  
8 significant control?"—a reference to the term used in the  
9 second paragraph of instruction 10. In the context of this  
10 case, "significant control" means the power to determine that a  
11 particular investment should be made or that a particular  
12 investment should not be made, or how a particular investment  
13 that has been made should be reported to investors. It does  
14 not mean exclusive control over investment and/or reporting  
15 decisions, which may be shared with or delegated to others, but  
16 it means more than just commenting on an investment decision or  
17 on its reporting. In other words, it means practical power  
18 over investment decisions and reporting, but not exclusive  
19 power.

20 In your second note, you ask, "What is the definition  
21 of specific role or duty?"—again, a reference to terms used in  
22 the second paragraph of instruction 10. In this case, the  
23 relevant role and duty is the practical power over Platinum  
24 investments or reporting of those investments, as described  
25 above. Again, however, it need not be exclusive power and the

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1 defendant need not be an officer or director of Platinum if he  
2 can exercise such power as a practical matter.

3 With respect to your third note asking for certain  
4 testimony, counsel and I are working on it and will get it to  
5 you shortly. And we are delighted that you will be staying  
6 until 5 p.m. today, as requested in your fourth note.

7 Please let us know if we can be of help in any other  
8 way.

9 Judge Rakoff.

10 Any objections, additions, comments, or whatever from  
11 plaintiffs' counsel?

12 MR. GLUCK: Yes. As to both notes what, appears to be  
13 missing, and I'm not sure if it was intentional, is the  
14 practical power of soliciting the investors. So there is two  
15 issues. There is what investments and then it is solicit  
16 investors.

17 THE COURT: Well, that was not intentional, but --

18 MR. LAUER: Your Honor --

19 THE COURT: I'm sorry. I will hear from you.

20 MR. LAUER: Soliciting investors, an 18-year-old could  
21 solicit investors.

22 THE COURT: The --

23 MR. LAUER: That has nothing --

24 THE COURT: I agree with that. That's why I am  
25 thinking about wording. I think the point that's being

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1 suggested is the power to control what investors should or  
2 should not be solicited. That would be a power to control.

3 MR. LAUER: I really don't think that's how that case  
4 is tried and --

5 THE COURT: You are saying there is no evidence on  
6 that issue.

7 So let me go back to plaintiffs' counsel what evidence  
8 is there—direct or circumstantial—that Mr. Bodner had the  
9 nonexclusive but practical power to determine which investor  
10 should be solicited and which should not?

11 MR. GLUCK: I said investors. I didn't just mean  
12 which, I meant how. And the evidence at trial, the testimony  
13 of Bernie Fuchs was that he was directed and authorized by  
14 Mr. Bodner to solicit investors for the BEOF, for example. And  
15 also the Seth Gerszberg presentation where he was urged that  
16 they take their 20 million in investors as well as the  
17 admission by Bodner at trial that he did initially solicit  
18 investors, and that's one of the reasons --

19 THE COURT: I agree with you that how investors should  
20 be approached is closer to what the evidence was in this case,  
21 but what is the evidence that he had control of it?

22 MR. GLUCK: The evidence that he had control over it  
23 is that Mr. Fuchs testified, when I asked Mr. Fuchs who  
24 authorized you to solicit the investors, answer was Mr. Bodner  
25 and Mr. Huberfeld. When I asked him the manner in which the



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1 investors were solicited, how was that done, that was approved  
2 by Mr. Bodner and Mr. Huberfeld.

3 THE COURT: All right.

4 MR. GLUCK: When Mr. Fuchs was writing an e-mail, he  
5 sent it to Mr. Bodner for approval and he said he would think  
6 about it and come back to him.

7 Another example would be Mr. Landesman stating in an  
8 e-mail which was put into evidence that he would wouldn't  
9 contact for investors further unless Bodner directed him to.

10 So it's about the direction. It's not -- I agree it's  
11 not being an agent, but it's about directing how investors  
12 would be brought to the fund, managing investments bringing  
13 investors in.

14 MR. LAUER: Your Honor, we went to the jury, our  
15 summation, using this instruction where instruction 10 focused  
16 on what this case is about, the investment, the valuation of  
17 the investment, and the instruction was, "In particular, those  
18 who manage the investment of an investment fund." Talking --  
19 these one or two isolated statements which are completely  
20 ambiguous and was never a need to focus on, Bernie Fuchs  
21 saying, oh, David Bodner said I could solicit an investor,  
22 there was no focus in this trial on that. And the idea that  
23 you can take a comment that I think it's a good idea, a good  
24 idea, if you will, to solicit someone that now David Bodner is  
25 a fiduciary and liable for a \$40 million valuation --

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1           THE COURT: I don't think it is necessarily a side  
2 comment, but I think the test of that, in part at least, is  
3 what did, which I don't remember offhand, but I'm sure  
4 Mr. Gluck will, what did you say about this, Mr. Gluck, in your  
5 summation?

6           MR. GLUCK: In my opening and my summation I said  
7 precisely the same words, that the question of whether  
8 Mr. Bodner is a fiduciary turns on whether he performed the  
9 active functions of a hedge fund manager. There are three  
10 active functions—the bringing in of investors in soliciting  
11 investments; the direction of how that money is then directed  
12 into investments and assets; and I also mentioned the  
13 logistical aspects, employee, running the fund, the operational  
14 things. I said that in the opening and the closing and  
15 throughout the case. In fact, the testimony of Mr. Post for  
16 nearly a day and --

17           THE COURT: Okay. Hold on. Let me just work on my  
18 wording for just a minute.

19           MR. GLUCK: Same comment. PX 479 is both in my  
20 closing -- I spent quite a bit of time on it. Landesman  
21 checking with Bodner before updating Fuchs right after the  
22 Black Elk. This is one the biggest investors in the fund.  
23 Landesman had to check with Bodner first. Now Mr. Lauer  
24 commented in his closing on this e-mail, too. So this was  
25 directly at issue and we have different takes on it.

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MR. LAUER: I am going to say, your Honor --

THE COURT: You know, about three seconds ago I said hold on, I want to work on my wording, and that just led both plaintiffs' counsel and defense counsel to continue talking. Now if you want to continue that, I will just bring in the jury and have them hear you bickering and then I will give them my instructions of law. But if you prefer otherwise, just please shut up for a minute.

(Pause)

THE COURT: All right, so I have reworded it to -- I will read the whole thing again.

To the jury:

Thank you for your four notes.

In your first note, you ask, "What is the definition of significant control?"—a reference to the term used in the second paragraph of instruction 10. In the context of this case, "significant control" means the power to determine whether a particular investment by Platinum should or should not be made, or the power to determine what potential investors in Platinum should or should not be told, or how a particular Platinum investment that has been made should be reported to investors. It does not mean exclusive control over investment, solicitation, and/or reporting decisions, which may be shared with or delegated to others, but it means more than just commenting on an investment decision or on its reporting or on

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1 what potential investors should or should not be told. In  
2 other words, it means practical power over investment  
3 decisions, solicitation, and/or reporting, but not exclusive  
4 power.

5 In your second note, you ask, "What is the definition  
6 of specific role or duty?"—again a reference to terms used in  
7 the second paragraph of instruction 10. In this case, the  
8 relevant role and duty is the practical power over Platinum  
9 investments, solicitation of investors, and/or reporting of  
10 those investments, as described above. Again, however, it need  
11 not be exclusive power and the defendant need not be an officer  
12 or director of Platinum if he can exercise such power as a  
13 practical matter.

14 With respect to your third note asking for certain  
15 testimony, counsel and I are working on it and will provide it  
16 to you at 9:30 a.m. tomorrow. And we are delighted that you  
17 will be staying until 5 p.m. today, as requested in your fourth  
18 note.

19 Please let us know if we can be of help in any other  
20 way.

21 All right. Any objections? I'm going to get to  
22 defense counsel.

23 Any other objections from plaintiffs' counsel? From  
24 plaintiffs' counsel.

25 MR. GLUCK: I sense that they are asking about

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1 specific, so I think in the context that led up to the jury  
2 instruction that they referenced and that this Court has  
3 referenced --

4 THE COURT: I'm really not hearing you.

5 MR. GLUCK: I'm sorry, and I didn't hear the Court  
6 when it said -- give me a minute.

7 I think they are asking about "reasonably puts its  
8 trust and confidence in the other parties carried out a  
9 particular role or undertake a particular duty." In this case  
10 that is the operation of a hedge fund.

11 THE COURT: I think what I have just said is more than  
12 enough to respond to your earlier objection and I don't think  
13 we need to add anything more.

14 Any objections from defense counsel?

15 MR. LAUER: Your Honor, I want to make a distinction.  
16 You added two things as it relates to investors. The first one  
17 which dealt with reporting I can accept because the instruction  
18 to the jury that we used for summation dealt with managing  
19 investments, and therefore what's reported to investors is  
20 connected to managing investors.

21 THE COURT: And also failing to object to payment of  
22 incentive fees and so forth.

23 MR. LAUER: The other -- on the second addition seems  
24 close to similar, but it's fundamentally different, and that is  
25 deciding whom can be solicited. And the reason for that is

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1 that could just as well be a human resources person who --

2 THE COURT: Whoa, whoa. I changed the wording after  
3 you raised that, so it doesn't say to whom the solicitations.  
4 It is what they will be told.

5 MR. LAUER: That's fine. I may have missed what they  
6 would be told.

7 THE COURT: I accepted that distinction and changed  
8 it.

9 MR. HERTZBERG: Your Honor, I just wanted to note that  
10 we were able to pull the pages and so we can provide it to the  
11 jury now and get rid of the third part.

12 THE COURT: Okay. So why don't you provide -- I take  
13 it there is no disagreement on those pages?

14 MR. HERTZBERG: Well, we are on the same page and we  
15 are not entirely sure what pages they are looking for what we  
16 think we know.

17 THE COURT: Okay. But you are in agreement as to what  
18 should go in there.

19 MR. HERTZBERG: Exactly.

20 THE COURT: Okay. So if there is something more, we  
21 can worry about that tomorrow, but so why don't you give that  
22 to my courtroom deputy, who will take it in, tell them that if  
23 they need multiple copies let us know, and we will give them  
24 that tomorrow morning because it is already 4:50.

25 Let me go downstairs. I'm not going to take any

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1 further argument on this note. It's the language I just gave,  
2 but I will give it to the my courtroom deputy who can give it  
3 to the jury.

4 (Pages 1380-1381 and 1803-1806 provided to jury)

5 (Recess pending verdict)

6 THE COURT: So here is the note we are going to send  
7 to the jury and --

8 THE LAW CLERK: They headed out for the night.

9 THE COURT: I will reword the wording very slightly to  
10 reflect that it's going to go to them first thing in the  
11 morning, and then I will ask my courtroom deputy to prepare.

12 THE DEPUTY CLERK: I didn't see you sneak past me. We  
13 have another note. They say the testimony they were asking  
14 for, they understand they can't get it until tomorrow because  
15 they are gone.

16 THE COURT: So the jury has left for the day. It's a  
17 few minutes after 5:00. So I had just finished putting the  
18 changes into the jury note. I will reword it just so it now  
19 makes clear that they are getting it tomorrow morning.

20 I will ask my courtroom deputy to go into the jury  
21 room now and retrieve the testimony and make eight more copies,  
22 and also I will give her in the next five minutes the response  
23 to the jury's other notes and she can make nine total copies of  
24 that, and we will then leave on the seats of the jurors in the  
25 jury room, each of those two items so that when they first come

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1 in they will have it right then and there.

2 All right. So -- you said there was a fifth note?

3 THE DEPUTY CLERK: Yes.

4 THE COURT: The fifth note says, "Can we get  
5 Mr. Bodner's testimony where Plaintiff Exhibit 1226 and  
6 Plaintiff Exhibit 433 was introduced right before John Czapla's  
7 testimony? Since we're breaking soon, understand this won't be  
8 available till tomorrow."

9 So while I am working on the final touches of the note  
10 so it will read that they are getting it tomorrow morning, why  
11 doesn't counsel work on that when pages are responsive and we  
12 will try to get that on each juror's chair tonight before we  
13 leave. And I am also going to mark the note or have my  
14 courtroom deputy mark the note after I revise it, my response  
15 to the notes as Court Exhibit 2. We have marked the charge as  
16 Court Exhibit 3.

17 THE DEPUTY CLERK: You want me to get the pages of the  
18 transcript that are in there now and just make eight copies?

19 THE COURT: Yes.

20 (Recess)

21 THE COURT: So I will hand to my courtroom deputy the  
22 responsive note. She should make a total of nine copies and  
23 should leave on the chairs of each of the jurors on top the  
24 note, then the transcripts responsive to the earlier transcript  
25 note, and finally the transcript that we will talk about in a



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1 minute responsive to the final note.

2 I will have my law clerk give each counsel a copy of  
3 the note and also give him a copy which we are marking as Court  
4 Exhibit 2 to be docketed.

5 Where do we stand on the final request?

6 MR. GLUCK: I believe we have agreement on what they  
7 asked for.

8 THE COURT: Agreement on?

9 MR. GLUCK: And printed. We have agreement on what  
10 they asked for and it's printed.

11 THE COURT: Okay. So hand it to my law clerk and I  
12 will read off the pages to save a little time. The court  
13 reporter already has the pages for the pages responsive to the  
14 first note, the first note that asks for testimony.

15 Now in response to what is actually the second note  
16 asking for testimony, though it's actually the fifth note of  
17 this note-happy jury, it is pages 1821, 1822, and 1823. So  
18 that will be delivered to -- will be part of the package left  
19 on the jurors' seats so when they come in the morning they will  
20 have everything.

21 So if I were you guys, I'd want to go home. Now, it's  
22 a public court. If you want to stick around of course that's  
23 your prerogative.

24 But so we will resume at 9:30 tomorrow, and again I  
25 always need at least one counsel for each side. All right.

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1 Very good. Thanks a lot.

2 COUNSEL: Good night, your Honor.

3 (Adjourned to Friday, December 16, 2022, 9:30 a.m.)